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NO.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

PATRICIA A. MERTENS PETITIONER

V.

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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117 pp

QUESTIONS PRESENTED FOR REVIEW

1. When, on remand in light of *Leatherman v. Tarrant County etc.*,[1] a state court considers a motion to dismiss a §1983 complaint asserting both individual and official capacity 1st Amendment patronage discharge claims, should the court apply its settled notice pleading principles even though the qualified immunity defense is implicated by the individual capacity claims?

2. In order to withstand a motion to dismiss, must a §1983 complaint that asserts individual capacity claims, even in notice pleading jurisdictions, meet a heightened, fact-specific pleading standard, because of the implications of the qualified immunity defense?

3. If there is a heightened, fact-specific pleading requirement for §1983 complaints, where the qualified immunity defense may be implicated, even in notice pleading jurisdictions, is a §1983 complaint asserting individual and official capacity 1st Amendment patronage discharge claims sufficiently fact-specific to withstand a motion to dismiss, where it alleged, inter alia, that the plaintiff satisfactorily performed her job, that she was affiliated with a different faction of the Democratic party than that of the newly elected governor, that affiliation with the faction of the Democratic Party of the newly elected governor was not an important requirement for the effective performance of the job, that she was terminated pursuant to the custom of the state whereby unclassified state employees not aligned with the newly elected governor are discharged and replaced by

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[1] 507 U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

QUESTIONS PRESENTED FOR REVIEW (continued)

such governor's political allies, and that the sole reason, or a substantial or motivating factor for her discharge was her political beliefs?

4. If a heightened pleading standard does apply to §1983 complaints that assert individual capacity claims because of the implications of the qualified immunity defense and, on remand, a court considered in light of *Leatherman v. Tarrant County etc.* a motion to dismiss a §1983 complaint that asserted both individual and official capacity claims and granted it by applying a higher fact-specific pleading standard than the state's settled notice pleading principles require, did the court impermissibly discriminate against the §1983 official capacity claims, contrary to the Supremacy Clause, by not independently applying the state's settled notice pleading principles to its consideration of the motion to dismiss the official capacity claims?

5. Where a state court §1983 complaint contained fact-specific allegations of *Branti v. Finkel* principles, and sought damages and injunctive relief for a patronage discharge, was the Supremacy Clause violated by the state court which dismissed the complaint for failure to state a claim in the face of the state's settled notice pleading principles that a complaint should not be dismissed unless it appears that the plaintiff would not be entitled to relief under any set of facts which could be proven in support of the claim, the allegations of the complaint are to be taken as true, construed in the light most favorable to the plaintiff, and may be in the form of conclusions so

QUESTIONS PRESENTED FOR REVIEW (continued)

long as there is notice of the claim, but the court found the complaint deficient as not demonstrating what conduct, speech or belief was constitutionally protected, as not showing that the defendants decided to dismiss her because of such conduct, as failing to show that she was not a policy-making employee, and as failing to claim that she publicly supported anyone in the Democratic primary or publicly criticized the administration of the newly elected governor, much less replaced for such criticism?

PARTIES

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

The Opinion of the Kentucky Supreme Court, rendered September 30, 1993, is unreported. (Appx. 1a-20a).

The Opinion of the Kentucky Supreme Court, rendered January 16, 1992, is unreported. (Appx. 22a-29a).

The Opini n of the Kentucky Court of Appeals rendered September 7, 1990, is unreported. (Appx. 30a-48a).

The Opinion of the Franklin Circuit Court, dated July 5, 1989, (Appx. 51a-55a) is unreported.

JURISDICTION

The Kentucky Supreme Court issued its opinion on September 30, 1993. This Petition is filed within 90 days thereof.

The ground on which the jurisdiction of this Court is invoked is that the final judgment, rendered by the highest court in the State of Kentucky in which a decision could be had, is reviewable by this Court by writ of certiorari where any right set forth is specifically claimed under the statutes of the United States.

Petitioner seeks redress for the deprivation of 1st and 14th Amendment rights pursuant to 42 U.S.C. §1983 by a reason of the patronage discharge of her from her unclassified employment with the Commonwealth of Kentucky.

The jurisdiction of this Court to review the opinion and judgment of the Kentucky Supreme Court is invoked pursuant to 28 U.S.C. §1257.

U. S. CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE VI

Assumption of public debt; Supreme law; Oath of office; Religious test prohibited. . . . .

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding. . . . .

FIRST AMENDMENT

Freedom of religion, speech and press; rights of assembly and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT

Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. STATUTE INVOLVED

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On January 20, 1989, Patricia A. Mertens ("Mertens") filed her verified Complaint under 42 U.S.C. §1983 in the Franklin Circuit Court of the Commonwealth of Kentucky, against the Respondents, sometimes collectively referred to as "Respondents." By her original Complaint (Appx. 58a-64a), she alleged, inter alia:

(a) that she became employed as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky on April 1, 1987;

(b) that she satisfactorily performed her job as Director of the Division of Child Support Enforcement until on or about January 29, 1988, when, without cause, Respondents discharged her from her employment;

(c) that at all times pertinent, Wilkinson was the head of a faction of the Democratic Party of the Commonwealth of Kentucky;

(d) that neither during the gubernatorial primary nor during the gubernatorial election of 1987 did she support the faction of the party of which Wilkinson is and was the head;

(e) that neither Democratic Party affiliation nor affiliation with the faction of the Democratic party of which Wilkinson is the head is an important requirement for the effective performance of the office of Director of Child Support Enforcement;

(f) that on or about February 15, 1988, Respondents caused the position formerly held by Mertens to be filled by a member of the faction of the Democratic Party of which Wilkinson was and is the head;

(g) that a substantial or motivating factor for the discharge of Mertens by Respondents or the sole reason for the discharge of Mertens by Respondents was her political beliefs;

(h) that a substantial or motivating factor for her discharge by Respondents or the sole reason for the discharge of her by Respondents was the political beliefs of her replacement;

(i) that her discharge by Respondents subjected her or caused her to be subjected to the deprivation of rights, privileges or immunities secured to her by the U.S. Constitution under color of statute, regulation custom or usage of the Commonwealth of Kentucky;

(j) that the 1st and 14th Amendments to the U.S. Constitution secured to her certain rights, privileges or immunities, including the protection against discharge from her employment because of her political beliefs.

Mertens alleged that by reason of the impermissible conduct of the Respondents she lost earnings, suffered embarrassment, humiliation, mental and emotional distress for which she sought compensatory damages. In addition, Mertens sought to recover punitive damages of Respondents, Wilkinson and Cowherd.

Mertens also sought the injunctive relief of reinstatement to her former employment at the level of compensation, including benefits, she would have

been earning but for the impermissible conduct of the Respondents, or in the alternative, front pay. She also sought her costs, including a reasonable attorney's fee under 42 U.S.C. §1988.

How The Federal Questions Sought To Be Reviewed Were Raised.

Mertens' Complaint was met with a motion to dismiss for failure to state a claim under Kentucky Civil Rule 12.02(f), Kentucky's equivalent of F.R.Civ.P. 12(b)(6). Among the grounds for dismissal asserted by Respondents was that the Complaint did not satisfy a heightened pleading requirement applicable to §1983 actions. Respondents' dismissal motion was not a direct assertion that the qualified immunity defense required dismissal. However, authorities they relied on to contend that a heightened pleading requirement applied to §1983 complaints were cases where the complaint was examined in light of the §1983 governmental defendant, named individually, and qualified immunity, e.g., *Chapman v. City of Detroit*, 808 F.2d 459 (6th Cir.1986); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984).

Addressing Kentucky's notice pleading principles, Mertens relied on *Gall v. Scroggy*, Ky.App., 725 S.W.2d 867 (1987), which holds that it was well settled in Kentucky that the pleadings should be construed liberally in a light most favorable to the plaintiff and all allegations in the complaint are to be

taken as true when the court is considering a KCR 12.02(f) motion. KCR 8.01(1) provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Mertens also cited and furnished the trial court a copy of the majority opinion in *Branti v. Finkel*, 445 U.S. 507, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980), a case not mentioned in the Respondents' motion.

By her Memorandum, Mertens pointed out that *Branti* holds "that discharge of a public employee solely because of the employee's political beliefs, where political affiliation is not an important requirement for the effective performance of that position, and the employee had satisfactorily performed the job is violative of the 1st and 14th Amendments."

After an oral argument, concluding that Mertens had not met its heightened pleading requirement, the trial court granted the motion and by its order entered March 29, 1989 (Appx. 49a-50a) gave Mertens "10 days in which to amend her complaint to state non-conclusory allegations of evidence of unconstitutional motive or intent."

Mertens timely filed her Amended Complaint (Appx. 65a-74a). which alleged, inter alia:

> That the termination of Plaintiff in her employment as Director of Child Support Enforcement was pursuant to the custom of the Commonwealth of Kentucky, constitutionally impermissible under the 1st and 14th Amendments to the U.S. Constitution, whereby unclassified state employees who were not politically allied with the newly elected Governor or his political supporters during the primary or general election are discharged by the newly elected Governor for the purpose of replacing such unclassified state employees with persons who were politically allied with the newly elected Governor or his political supporters during the primary or general election, all without regard to whether political affiliation with the newly elected Governor is an important requirement for the effective performance of the employment from which such unclassified state employee is discharged. (Appx. 66a-67a).

The Amended Complaint also alleged that Mertens was demonstrably affiliated with a faction of the Kentucky Democratic Party which was not aligned with the faction of which the newly elected Governor was the head; that the newly elected Governor had campaigned against a major and much publicized action of the Governor who headed the faction of the Kentucky Democratic Party with which Mertens was aligned.

Mertens' Amended Complaint detailed the nature of the Division of Child Support Enforcement as being tightly regulated by federal law and regulation, and alleged that she was replaced by a political ally of the Fayette County attorney, a person enjoying significant influence on political patronage for the administration of the Respondent Governor. Mertens alleged that contemporaneous with Mertens' termination, effective January 29, 1988, by letter dated January 22, 1988,[2] Mertens was complimented by her immediate superior for her job performance as Director of Child Support Enforcement. Mertens' entire Amended Complaint is Appx. 65a-74a hereto.

The trial court by written opinion (Appx. 51a-55a) dismissed the Complaint, as amended, and Mertens timely appealed. The pertinent rulings[3] of trial court

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[2] The body of the January 22, 1988 letter in its entirety was:

> Your services as Director of the Division for Child Support Enforcement in the Department of Social Insurance will no longer be needed after the close of business on January 29, 1988.
>
> Consequently, you will be terminated on that date.

[3] The rulings of the trial court and the Court of Appeals, not directly pertinent to the question of a heightened pleading requirement for §1983 actions were, as follows:

(1) The trial court and the Court of Appeals decided that Mertens had no property interest in her unclassified employment protected by the 14th Amendment, although Mertens never claimed that she did.

(2) The Court of Appeals, disagreeing with the trial court, held that there were no administrative remedies available to Mertens which required exhaustion prior to commencing this §1983 action.

(3) Disagreeing with the trial court, the Court of Appeals held that this §1983 action may be brought in state court, and that the §1983 claims (for damages) against Wilkinson and Cowherd, individually, and

(continued...)

and the Kentucky Court of Appeals were as follows:

(1) The trial court ruled that a claim for relief must be stated in terms of facts rather than conclusions (Appx. 54a), and that Mertens had not met the trial court's heightened pleading requirements in order to state a claim. (Appx. 54a).

The Court of Appeals held that there is a heightened pleading requirement for §1983 actions filed in Kentucky's courts, (Appx. 38a-39a), notwithstanding the Kentucky authorities to the contrary with respect to all other cases filed in Kentucky's courts, (Appx. 37a-38a), and that Mertens' §1983 Complaint and Amended Complaint did not satisfy that heightened pleading requirement. (Appx. 37a).

(2) The trial court ruled that *Branti v. Finkel, supra*, is distinguishable from Mertens' §1983 action, because the plaintiffs in *Branti* "made a showing" that they were discharged for their political beliefs, and "made a showing" that they were not in policy making positions, while Mertens had only *alleged* that she was discharged for her political beliefs, and had only *alleged* that her former position was not a policy making position. (Appx. 53a).

The Court of Appeals substantially agreed with the trial court and such agreement formed the basis upon which the Court of Appeals affirmed. In affirming, the Court of Appeals held that Mertens failed to meet "her burden of showing that the appellees infringed upon

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[3](...continued)
against all Defendants for injunctive relief were properly brought.

her First Amendment rights" (Appx. 44a), nor did she assert any conduct, speech or belief that was constitutionally protected, "nor has she shown that the appellees decided to dismiss her because of any such conduct." (Appx. 44a).

The Court of Appeals further held that the "General Assembly apparently intended her job to be considered as a policymaking position" (Appx. 44a). Continuing its agreement with the trial court that there is a "showing" requirement at the KCR 12.02(f) stage, the Court of Appeals held that because Mertens had "not adequately shown by facts what activities or conduct she undertook that would have been protected speech nor . . . shown the intent of the appellees to deprive her of this right," (Appx. 45a), this case is distinguishable from *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, supra. The Court of Appeals observed that Mertens "was a member of the Democratic party and her replacement was a Democrat." (Appx. 45a).

In addition, the Court of Appeals held that because the claimants in *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972), and *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977) "were able to factually show constitutionally protected conduct that the employer used to retaliate against the employee" (Appx. 45a), this case was distinguishable.

Until this case, there had never been a "showing" requirement under Kentucky's settled notice pleading principles. The allegations of the complaint have always been taken as true on a KCR 12.02(f) motion

to dismiss for failure to state a claim. See, *Gall v. Scroggy*, Ky., 725 S.W.2d 867 (1987).

Mertens sought and was granted discretionary review by the Kentucky Supreme Court.[4]

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[4] The following are the questions of law upon which discretionary review was sought (verbatim):

1. Does the §1983 complaint state a claim for the violation of Mertens' 1st Amendment rights for which relief may be granted if it alleged, inter alia, that Kentucky has a de facto one-party system in gubernatorial elections, the factionalized Democratic Party; that neither during the primary nor general election did Mertens support the faction of the Democratic party of which the Governor was the head; that affiliation with that faction of the Democratic party was not an important requirement for the effective performance of her job; that she satisfactorily performed her job; that she was discharged without cause by the newly-inaugurated Governor, under color of Kentucky's custom of discharging non-classified employees who did not support the elected administration; and that a substantial or motivating factor or the sole reason for her discharge was her political beliefs and/or the political beliefs of her replacement?

2. Is there a different (heightened) pleading requirement applicable to complaints in §1983 actions which is not applicable to all other complaints under CR 8.01 in order for the complaint to withstand a motion to dismiss for failure to state a claim under CR 12.02(f).

3. If there is a such a heightened pleading requirement for complaints in §1983 actions which is not otherwise applicable to other complaints under CR 8.01, did Mertens' complaint, as amended, meet that heightened pleading requirement?

4. If a heightened pleading requirement exists for §1983 complaints in Kentucky, and Mertens' Complaint, as amended, did not meet that requirement, should the judgment be reversed with leave to amend her complaint to meet that requirement?

5. If a §1983 complaint is met with a motion to dismiss for failure to state a claim under CR 12.02(f), is a §1983 plaintiff required to make any "showing" at that stage of the proceedings?

6. Does Mertens' membership in the Democratic Party, and the fact that her replacement and the Governor who discharged her were Democrats, but of a different faction of the Democratic Party from Mertens, defeat Mertens' claim that she was discharged because of her political beliefs and affiliations in violation of her rights under the 1st Amendment?

In her Brief to the Kentucky Supreme Court, Mertens relied on state court authorities defining Kentucky's settled notice pleading principles: *Upchurch v. Clinton County*, Ky., 330 S.W.2d 428 (1959) [a KCR 12.02(f) motion admits as true the material facts of the complaint]; *Ewell v. Central City*, Ky., 340 S.W.2d 479 (1960) (a complaint should not be dismissed unless it appears that the plaintiff would not be entitled to relief under any set of facts which could be proved to support the claim); *Pierson Trapp Company v. Peak*, Ky., 340 S.W.2d 456 (1960) ("it is immaterial whether the complaint states 'conclusions' or 'facts' as long as fair notice is given" *Id.*, at 460); *Gall v. Scroggy, supra*, (the pleadings should be liberally construed in a light most favorably to the plaintiff and all allegations in the complaint are to be taken as true).

The Supreme Court declined to defer to the truth of the allegations of Mertens' Complaint, as amended, holding instead that Mertens' position of Division Director of Child Support Enforcement was "a significant, high-level position in the state government system"; that "(o)nly the Commissioner of Social Insurance and the Secretary of the Cabinet for Human Resources were closer to the Governor in the ranking system"; that the position "involve(d) supervisory duties of more than two hundred employees"; that the Kentucky Civil Service laws define the position as "policy-making"; that "division directors who are considered policymakers are not certified"; and that "(i)f a division director disagrees, a hearing is held." On this point, the Court concluded, "clearly, it is in

choosing or dismissing individuals at this high level of service that enables an administration to further the goals and implement the policies for which it was elected." (Appx. 25a).

The Supreme Court distinguished this case from *Branti* on the ground that the plaintiffs there "held only entry level positions. None of the political patronage cases cited by Mertens dealt with the high level office involved here." (Appx. 25a).

The following excerpt from the Opinion of the Kentucky Supreme Court is central to its holding that Mertens' Complaint was deficient:

> In evaluating allegations of wrongful discharge in a § 1983 action, the defendant's motive must be ascertained. *Tanner v. McCall*, 625 F.2d 1183, 1193 (5th Cir. 1980). In determining motive, courts have consistently required more than a mere claim of the defendant's discriminatory intent. *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Haas v. Barren Co. Sheriff's Dept.*, 658 F.Supp. 877 (W.D. Mich. 1987). All of the federal circuit courts require this. *Hobson, supra* at 29-30.
>
> A pleading will not be sufficient to state a cause of action under §1983 if its allegations are only conclusions. *Place v. Shephard*, 446 F.2d 1239, 1244 (6th Cir. 1971). *Blackburn v. Fisk University*, 443 F.2d 121 (6th Cir. 1971); *Chapman v. City of Detroit*, 808 F.2d 459 (6th Cir. 1986).

The authorities relied on by Respondents at the briefing stage at the Supreme Court principally implicated qualified immunity, e.g., *Poe v. Hayden*,

853 F.2d 418 (6th Cir., 1988), *Gutierrez v. Municipal Court of Southeast Judicial District*, 838 F.2d 103 (9th Cir., 1988), and *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), upon which the Supreme Court relied heavily. Mertens, by her Reply Brief, was unable to dissuade the Supreme Court from using qualified immunity cases as authority that Mertens' Complaint failed to state a claim under a motion where qualified immunity was not involved.[5]

Noting that Mertens relied on *Howlett v. Rose*, 496 U.S. 356, 110 L.Ed.2d 332, 110 S.Ct. 2430 (1990), "for the proposition that when a state court is charged with the responsibility of enforcing federal law the state court must follow its regular mode of procedure," the Supreme Court held:

> The mere fact that state court claims do not require pleading with specificity is totally irrelevant to the issue of a §1983 pleading." (Appx. 27a)

Notwithstanding the absence of anything in the record, other than Mertens' sworn allegations to the contrary, that political affiliation is an important or appropriate requirement for the position involved, the Supreme Court concluded that Mertens' former office was "a significant policy-making position", that she has no legal recourse to protest her discharge under §1983 and that having had a sufficient opportunity to "meet any standard of pleading requirements provided

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[5] Respondents, Wilkinson and Cowherd, were sued in both their individual and official capacities. Qualified immunity was not stated as a basis for the ruling of any Court prior to the filing of first Petition in this Court.

by law," she was denied further leave to amend, and the Court of Appeals was affirmed. (Appx. 28a).

Mertens timely petitioned this court for writ of certiorari to the Kentucky Supreme Court by reason of that Opinion. On March 8, 1993, 122 L.Ed.2d 779, this Court granted Mertens' petition, vacated the judgment of the Supreme Court of Kentucky and remanded the case to the Supreme Court of Kentucky for further consideration in light of *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. ___, 122 L.Ed.2d 517, 113 S.Ct. 1160 (1993).

On remand, the Supreme Court of Kentucky on September 30, 1993, rendered its Memorandum Opinion, affirming the dismissal of Mertens' complaint. (Appx. 1a-20a). This the Court did without requesting any additional briefing by the parties, and without benefit of oral argument.

Under Ky. Civil Rule 76.32(1)(b), petitions for rehearing

> . . . will be granted only when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto.

Because of Rule 76.32(1)(b), and because a rehash in petitions for rehearing of arguments made at the briefing stage are not favored by the Kentucky Supreme Court, Mertens filed no petition for rehearing.

REASONS FOR GRANTING THE WRIT

Questions 1[6], 2[7] and 3[8]:

The governmental §1983 defendant, named individually, enjoys immunity (from suit and liability) only if the *particularized* conduct of which he is accused violated clearly established constitutional law as he, objectively, should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982); *Anderson v. Creighton*, 483 U.S. 635,

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[6] When, on remand in light of *Leatherman v. Tarrant County etc.*, a state court considers a motion to dismiss a §1983 complaint asserting both individual and official capacity 1st Amendment patronage discharge claims, should the court apply its settled notice pleading principles even though the qualified immunity defense is implicated by the individual capacity claims?

[7] In order to withstand a motion to dismiss, must a §1983 complaint that asserts individual capacity claims, even in notice pleading jurisdictions, meet a heightened, fact-specific pleading standard, because of the implications of the qualified immunity defense?

[8] If there is a heightened, fact-specific pleading requirement for §1983 complaints, where the qualified immunity defense may be implicated, even in notice pleading jurisdictions, is a §1983 complaint asserting individual and official capacity 1st Amendment patronage discharge claims sufficiently fact-specific to withstand a motion to dismiss, where it alleged, inter alia, that the plaintiff satisfactorily performed her job, that she was affiliated with a different faction of the Democratic party than that of the newly elected governor, that affiliation with the faction of the Democratic Party of the newly elected governor was not an important requirement for the effective performance of the job, that she was terminated pursuant to the custom of the state whereby unclassified state employees not aligned with the newly elected governor are discharged and replaced by such governor's political allies, and that the sole reason, or a substantial or motivating factor for her discharge was her political beliefs?

97 L.Ed.2d 523, 107 S.Ct. 3034 (1987).

Qualified immunity principles require the trial court to determine at the earliest possible stage whether the individual §1983 defendant enjoys qualified immunity, see *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985).

Leatherman, supra, of course, decided that §1983 complaints alleging municipal liability (only), where qualified immunity is not implicated, *Owen v. City of Independence*, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980), need not meet a heightened pleading standard to withstand a dismissal motion under Federal notice pleading principles.

The first three questions of this Petition, however, concern the pleading standard required of a complaint alleging, *inter alia*, individual liability of a §1983 governmental defendant, where qualified immunity is implicated. Therefore, the questions presented, as of yet unaddressed by this Court, are important ones.

Kentucky, like the federal courts, is a notice pleading jurisdiction. Thus, granting this Petition and deciding these questions, will most probably result in a resolution of the matter for federal courts as well.

Among the important underlying issues to the questions presented can be found the following:

(a) In that qualified immunity is an affirmative defense, is a motion to dismiss for failure to state a claim really the proper vehicle to be used to establish whether an individual §1983 defendant enjoys the defense?

(b) If a motion to dismiss for failure to state a claim is the proper vehicle for establishing whether an individual §1983 defendant enjoys immunity, and more fact-specific pleading of such complaints is required, are the official capacity claims to be analyzed under traditional notice pleading principles.

(c) If more particularity is called for by complaints alleging individual §1983 claims, so as to apprise the the trial court, who must decide from the specific contours of the right claimed to have been violated whether or not the law was clearly established, if the complaint is not sufficiently fact-specific to so apprise the court, is an order dismissing too harsh a result, or should the court direct the §1983 plaintiff to further define the violation claimed? See, e.g., *Jackson v. City of Beaumont Police Department*, 958 F.2d 616, 621 (5th Cir., 1992).

Some federal courts of appeals require §1983 complaints naming governmental defendants individually to particularize the contours of the right claimed to have been violated in order to withstand a dismissal motion, regardless of whether the qualified immunity defense has been raised. (See discussion below.) It would appear that Kentucky has joined ranks with those circuits with the opinion below.

Other circuits do not require particularized pleading of such complaints unless and until the qualified immunity defense is raised. (See discussion below.)

At the outset of its Opinion, the Court below noted that the §1983 claim in *Leatherman* was asserted

against a municipality. The Court below then quoted *Leatherman*, 122 L.Ed.2d at 523:

> We thus have no occasion to consider whether our qualified immunity prudence would require a heightened pleading in cases involving individual government officials.

After preliminarily suggesting that *Leatherman* was thus not controlling here (implying that the cases are distinguishable because of the existence of individual capacity claims here, and the absence of such claims in *Leatherman*), the Court below went on to hold, after quoting *Leatherman*[9], that it appeared to it that *Leatherman* "applie[d] to all §1983 cases, not only those involving municipal liability." (Appx. 3a).

Suggesting that it was applying Kentucky's notice pleading principles to decide whether the §1983 complaint should be dismissed for failure to state a claim, the Court below did otherwise. The Court below sustained the motion to dismiss the highly fact-specific §1983 complaint asserting both individual and official capacity 1st Amendment patronage discharge claims by finding the complaint deficient in that Mertens had not "put forward any conduct, speech or belief that was constitutionally protected," had not "shown" that the defendants decided to dismiss her because of such conduct, "failed to show" that she was not a policy-making employee, and did not claim

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[9] "We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman*, 122 L.Ed.2d at 524.

that she publicly supported anyone in the Democratic primary or publicly criticized the administration of the newly elected governor, much less was replaced for such criticism. (Appx. 7a, 5a).

Under Kentucky's settled notice pleading principles, as the Court below noted (Appx. 10a), a complaint should not be dismissed unless it appears that the plaintiff would not be entitled to relief under any set of facts which could be proven in support of the claim, that the allegations of the complaint are to be taken as true, that the allegations are to be construed in the light most favorable to the plaintiff, and may be in the form of conclusions so long as there is notice of the claim.

Mertens' complaint alleged, inter alia, that the plaintiff satisfactorily performed her job, that she was affiliated with a different faction of the Democratic party than that of the newly elected governor, that affiliation with the faction of the Democratic Party of the newly elected governor was not an important requirement for the effective performance of the job, that she was terminated pursuant to the custom of the state whereby unclassified state employees not aligned with the newly elected governor are discharged and replaced by such governor's political allies and that the sole reason, or a substantial or motivating factor for her discharge was her political beliefs. (Appx. 58a-64a). Certiorari was granted in *Leatherman* to resolve the conflict among the Courts of Appeals concerning the applicability of the heightened pleading standard to §1983 claims against municipalities. Because no individual capacity claims were asserted

there, *Leatherman* could not have properly, and therefore, did not undertake to resolve the conflict among the circuits concerning the applicability of the heightened pleading standard to §1983 claims asserted against individual government officials where qualified immunity is implicated.

The 5th Circuit requires §1983 complaints to meet a heightened pleading requirement in cases where qualified immunity can be raised. *Jackson v. City Beaumont Police Dept., supra.* Conclusory allegations in a §1983 complaint (involving municipal liability only) will not survive a dismissal motion in the 5th Circuit. *Rodriguez v. Avita*, 871 F.2d 555 (5th Cir., 1989).

The D.C. Circuit in *Hunter v. District of Columbia*, 943 F.2d 69 (D.C. Cir., 1991), held, *inter alia*, although there was a §1983 claim against a police officer, individually, ". . . that the heightened pleading requirement is not contingent upon the existence of a substantively distinct qualified immunity 'defense,' . . . ." *Id.* at 75.

However, in the 10th Circuit, the §1983 complaint must satisfy a heightened pleading requirement only when the qualified immunity defense is raised. *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir., 1990).

This Petition ought to be granted so that this Court may address the important questions surrounding pleading §1983 claims against individual governmental defendants. Because Kentucky is a notice pleading state, resolution of these questions will resolve the conflict among the circuits where notice pleading obtains under the Federal Rules of Civil Procedure.

Questions No. 4[10] and 5[11]:

In a case decided under the Supremacy Clause, this Court in *Testa v. Katt*, 330 U.S. 386, 91 L.Ed.2d 967, 67 S.Ct. 810 (1947), held that a state cannot

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[10] If a heightened pleading standard does apply to §1983 complaints that assert individual capacity claims because of the implications of the qualified immunity defense and, on remand, a court considered in light of *Leatherman v. Tarrant County etc.* a motion to dismiss a §1983 complaint that asserted both individual and official capacity claims and granted it by applying a higher fact-specific pleading standard than the state's settled notice pleading principles require, did the court impermissibly discriminate against the §1983 official capacity claims, contrary to the Supremacy Clause, by not independently applying the state's settled notice pleading principles to its consideration of the motion to dismiss the official capacity claims?

[11] Where a state court §1983 complaint contained fact-specific allegations of *Branti v. Finkel* principles, and sought damages and injunctive relief for a patronage discharge, was the Supremacy Clause violated by the state court which dismissed the complaint for failure to state a claim in the face of the state's settled notice pleading principles that a complaint should not be dismissed unless it appears that the plaintiff would not be entitled to relief under any set of facts which could be proven in support of the claim, the allegations of the complaint are to be taken as true, construed in the light most favorable to the plaintiff, and may be in the form of conclusions so long as there is notice of the claim, but the court found the complaint deficient as not demonstrating what conduct, speech or belief was constitutionally protected, as not showing that the defendants decided to dismiss her because of such conduct, as failing to show that she was not a policy-making employee, and as failing to claim that she publicly supported anyone in the Democratic primary or publicly criticized the administration of the newly elected governor, much less replaced for such criticism?

discriminate procedurally against federal claims.

Howlett v. Rose, 110 L.Ed.2d 332, 351, held:

> . . . States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.

Judge McDonald by his dissent to the Court of Appeals' Opinion concisely spelled out the applicability of the Supremacy Clause to this action, the adequacy of Mertens' §1983 complaint under Kentucky's notice pleading principles and the fact that Mertens' complaint "easily fell within the parameters" of *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980), with respect to the necessary allegations of a §1983 complaint. (Appx. 47a).

As Justice Leibson pointed out by his dissent to the Opinion below, the liberal system of "notice pleading" set up by the federal [Rule 8(A)(2)] and the Kentucky rule (KCR 8.01) are to the same effect. (Appx. 13a) Nevertheless, as Justice Leibson pointed out by his dissent, Mertens complaint was dismissed under heightened pleading requirements which no longer exist in civil rights cases. (Appx. 20a).

Kentucky's notice pleading principles cannot be reconciled with the decision by the Court below that dismissed both the individual and official capacity claims asserted in the §1983 complaint. Even if Respondents had an argument that a higher fact-specific standard is called for where individual capacity § 1983 claims are asserted, there is no argument for applying such a heightened standard to effect dismissal of §1983 official capacity claims.

These questions raise the important one of whether a state *must*, in light of the Supremacy Clause, apply its own neutral procedural rules when deciding the sufficiency of a §1983 complaint, if to do otherwise would defeat some or all of the §1983 claims. The question is particularly important, where, as here, the state abandoned its settled notice pleading principles to address and dismiss the §1983 complaint.

By applying a heightened pleading standard, while claiming that it was applying its settled notice pleading principles, Kentucky thereby discarded any semblance of neutrality where a §1983 claim is involved.

Branti v. Finkel expressly abandoned the "policy-maker" test of *Elrod v. Burns*, and replaced it with an affirmative defense requiring the hiring authority to show that political affiliation is an appropriate requirement for the effective performance of the office if the patronage discharge claim is to be defeated. Mertens' complaint was premised on *Branti*, and even alleged the negative of that affirmative defense. (Appx. 60a). By declining to treat the allegations of Mertens' complaint as true as Kentucky's pleading principles require, the Kentucky Supreme Court impermissibly discriminated against the §1983 claim. In the same breath, the Court committed error by defining Mertens' former office as a "high level office" (Appx. 5a) and affirming the dismissal. Thereby, the Court erroneously followed the *Elrod* rule which was repudiated by *Branti*.

Under *Testa v. Katt, supra*, and the Supremacy Clause, such discrimination by the highest court of Kentucky against a federal claim, here §1983, is impermissible. Review should be granted to so hold.

A "notice of the claim" standard obtains in the Third Circuit, as well as the D.C. Circuit. Such a standard also obtains in Kentucky for all claims except federal civil rights claims, as evidenced by the opinion below.

The 3rd Circuit in *District Council 47, American Federation of State, County and Municipal Employees, AFL-CIO v. Bradley*, 795 F.2d 310 (3rd Cir., 1986), stated that the test for evaluating the sufficiency of a civil rights complaint on a Rule 12(b)(6) motion to dismiss is

> . . . whether the complaint alleges sufficient facts so as to preclude a determination that the complaint is frivolous and whether sufficient facts are pleaded so as to provide a defendant with enough information so that an answer may be framed. *Id.* at 314.

The *Bradley* court went on to hold that it cannot be expected that a complaint provide proof of plaintiff's claims, nor a proffer of all available evidence. The Third Circuit's pleading standard with respect to §1983 claims, and Kentucky's settled notice pleading principles applicable to state court (non-federal) claims do not differ in any material respect. See, dissent, McDonald, J., Kentucky Court of Appeals. (Appx. 46a).

If Mertens' complaint had been subjected to the standard followed by the Third Circuit Court of Appeals, her complaint would not have been dismissed.

The D.C. Circuit in *Hobson, supra*, at 29, held:

> The allegations on this issue (that defendants acted with an unconstitutional motive) need not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds. (Parenthetical supplied).

Mertens' complaint satisfies this D.C. Circuit standard even when tested against a dismissal motion raising the qualified immunity defense. Respondents can make no realistic argument that they could not ascertain from Mertens' §1983 complaint that she claimed a violation of her 1st Amendment rights as being a victim of Kentucky's time-honored custom whereby newly elected governors dismiss all non-classified state employees who had not aligned themselves with the governor during the preceding election.[12]

There is an additional factor which evidences the Kentucky Supreme Court's violation of the non-discriminatory principle of *Testa v. Katt*: After pointing out what it perceived to be the fact-specific pleading deficiencies of Mertens' complaint, as

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[12] Under Kentucky's Constitution, governors serve a 4-year term and are not permitted to succeed themselves.

amended, the Court ordered her complaint dismissed. (Appx. 7a).

Mertens had had but one opportunity to amend, but was denied any opportunity to meet the Court's claimed fact-specific deficiencies. Under KCR 15.01 "leave (to amend) shall be freely given when justice so requires." Thus, the Court discriminated against Mertens' §1983 claim by failing to follow its own procedural rule.

If Mertens' §1983 complaint had been subjected to 3rd Circuit analysis, or D.C. Circuit analysis, or this Court's analysis under *Siegert v. Gilley*, 500 U.S. 226, 114 L.Ed.2d 277, 111 S.Ct. 1789 (1991), where qualified immunity is implicated, or Kentucky's own settled notice pleading principles, it would have survived a motion to dismiss for failure to state a claim. It is only because Kentucky applied an unprecedented, heightened pleading requirement to the §1983 complaint, while denying that it was doing so, that Mertens' complaint was dismissed, and the Supremacy Clause offended.

CONCLUSION

WHEREFORE, Petitioner prays that her Petition for Writ of Certiorari to the Kentucky Supreme Court be granted to review the decision thereof, with proceedings pursuant to the Rules of this Court.

Respectfully submitted,

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APPENDIX

RENDERED: September 30, 1993
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
90-SC-778-DG

PATRICIA A. MERTENS — APPELLANT

ON REVIEW FROM COURT OF APPEALS
V. 89-CA-1829
(FRANKLIN CIRCUIT COURT NO. 89-CI-98)

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually, and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This matter is before us on remand from the Supreme Court of the United States.

Mertens served as Director of the Division of Child Support Enforcement under the administration of Governor Martha Layne Collins. Mertens was discharged shortly after Wallace G. Wilkinson become Governor. She filed suit under 42 U.S.C. §1983 in Franklin Circuit Court seeking damages against Wilkinson and others alleging violation of her constitutional rights under the First and Fourteenth Amendments. She claimed that she was terminated from her unclassified position with the Cabinet for Human Resources because she was an appointee of Governor Collins and did not support Wallace Wilkinson during his gubernatorial campaign. Specifically, she alleged in her original complaint that "a substantial or motivating factor . . . or the sole reason for the discharge of the plaintiff by the defendants . . . was her political beliefs." She claimed that the defendants had unconstitutionally deprived her of rights guaranteed by the First Amendment.

On a number of grounds, the trial judge dismissed the amended complaint for failure to state a claim upon which relief can be granted. The Court of Appeals affirmed, but on the grounds that a § 1983 action is subject to a "heightened pleading standard" requiring extraordinary factual particularity in the complaint and that Mertens failed to satisfy this standard with regard to the allegations that her political beliefs were the basis of her discharge and

that the position in question was not a policy making one.

We affirmed by unanimous memorandum opinion which became final on April 9, 1992. The Supreme Court of the United States granted certiorari and vacated our decision, remanding it for further consideration in view of that court's decision in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

Leatherman, supra, held that a heightened pleading standard does not apply under the Federal rules in §1983 actions alleging municipal liability. The U.S. Supreme Court said in part:

> We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government employees.

At this point it would not seem that Leatherman is controlling in this case. The opinion, however, proceeds to find occasion to speak of the "particularity standard" more generally.

> We think that it is impossible to square the "heightened pleading standard" applied with the liberal system of "notice pleading" under the Federal rules.

Consequently, it would appear that the U.S. Supreme Court believes its holding applies to all §1983 cases, not only those involving municipal liability. Therefore, we must consider this case in the light of that standard.

Mertens argues that her complaint stated a claim for relief which may be granted because under Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), discharging a public employee solely because of the employee's political affiliation when political affiliation is not a requirement for the effective performance of that position, and where the employee had satisfactorily performed the job is violative of the First Amendment and is also made applicable to state employees through the Fourteenth Amendment.

It is clear that the First Amendment forbids discharge of public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. Rutan v. Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), Branti v. Finkel; Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, the U.S. Supreme Court stated in Rutan that a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high level employees on the basis of their political views. S.Ct. at 2737, L.Ed.2d at 66, citing Elrod v. Burns, supra.

We believe it is clear that Mertens' position, that of Division Director of Child Support Enforcement, is a significant, high-level position in the state government system. Only the Commissioner for Social Insurance and the Secretary of the Cabinet for Human Resources were closer to the Governor in the ranking system. It also involves supervisory duties of more than two hundred employees. The civil service laws embodied

in Kentucky's statutory system clearly define the position as "policy-making." Clearly, it is the selection or dismissal of individuals at this high-level of service that enables an administration to further the goals and implement the policies for which it was elected.

There is no merit in Mertens' contention that Branti v. Finkel compels a different result. The plaintiffs in Branti held only entry level positions. None of the political patronage cases cited by Mertens dealt with the type of high level office involved here.

The position of Division Director of Child Support Enforcement is unclassified by statute. K.R.S. 18A.115(i). Mertens was subject to dismissal upon written notice by the appointing authority "for cause or without cause." 101 KAR 3:050(3).

Mertens claims that when Collins was succeeded by Wilkinson, he replaced her with a member of his "political faction." She was a member of the Democratic Party and her replacement was a Democrat. Her pleading, considered with the most liberal construction of notice pleading, has not demonstrated by facts what activities or conduct she undertook that would have been protected speech, nor has she shown the intent of Wilkinson and others to deprive her of this right. Mertens does not claim that she publicly supported anyone in the Democratic primary or that she opposed the Wilkinson faction of the Democratic Party. There is no allegation that she publicly criticized the Wilkinson administration, much less that she was replaced for such criticism.

Certainly, any infringement of Federal First Amendment rights by the State is actionable under §

1983 claims. However, it has also been held that an employee who is not tenured or who has no guarantee of reemployment may not be denied his or her job on a basis that infringes on the employee's constitutionally protected interests, such as the First Amendment freedom of speech. Cf. Branti; Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). In order to establish a First Amendment claim, the employee must show that her conduct or speech was constitutionally protected and that this conduct was a substantial factor in the decision by the employer not to continue her employment. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Sufficient factual proof of the unconstitutional motive must also be pled because such allegations are important so as to give fair notice and allow the employer to rebut the claims. Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984).

The impact of political patronage systems on the First Amendment rights of an employee has been reviewed by the United States Supreme Court. Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), held that if political patronage dismissals and hirings are to survive constitutional scrutiny they must further some vital end by a means that is least restrictive of freedom of belief and association in achieving that end and the benefit gained must outweigh the loss of constitutionally protected rights. The U.S. Supreme Court found that dismissing a nonpolicy making employee failed such a test but that party affiliation and preference may be an acceptable

requirement for some types of government employment. It held that the interest of the government can be fully satisfied by limiting patronage dismissals to those in policy-making positions. The real question is whether the hiring authority can show that party affiliation is an appropriate requirement for the effective performance of the office involved.

Here, Mertens has failed to meet her burden of notice pleading to demonstrate that Wilkinson and others infringed on her First Amendment rights. She has not put forward any conduct, speech or belief that was constitutionally protected and she has not shown that Wilkinson and others decided to dismiss her because of any such conduct. Her position was nonclassified by statute and she could be dismissed for cause, or without any cause. Apparently the legislature intended her job to be considered as a policy-making position. She was the Director of the Division of Enforcement of Child Support, and as such, would have authority over others who would have influence over her division's activities. The claimants in Elrod, supra, and Branti were certainly not policy making employees. Consequently, Mertens has failed to show that she falls within the same class for a § 1983 action.

We now turn briefly to the question of whether any interest in the protection of liberty and property under the ambit of the Fourteenth Amendment is available to Mertens. We do not believe so. When neither the terms of the appointment nor any statute or regulation secured any entitlement or interest in continuing employment or reemployment, the claimant could not

establish a property interest sufficient pursuant to the Fourteenth Amendment to entitle her to an interest concerning continued or reemployment. Cf. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

It must be remembered that her position was not classified under Kentucky law. There was no contract evidencing her employment. As a Director of the Division of Child Support Enforcement, she was appointed by a department head with the written approval of the Governor. K.R.S. 12.050. K.R.S. 18A.115(i) also states that division directors are not included under the classified service. 101 KAR 3:050(3) holds that an unclassified state employee may be dismissed by the appointing authority on written notice for cause or without cause. 101 KAR 3:050(1) provides that employees in executive policy making positions serve at the pleasure of the appointing authority. Pursuant to 101 KAR 1:350 §16(1), only an unclassified employee who is dismissed for cause may appeal to the Personnel Board for review. Mertens had no sufficient property interest in her position.

She was not deprived of any liberty interest when she was released. A liberty interest in an employment situation is presented when the dismissal recognizes a stigma or disability that prevents other employment possibilities. There must be something in the nature of untruths published about an employee and such statements must prevent further employment. Roth, supra; Cf. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494

(1984). An employee is not deprived of liberty when the employee is not rehired in one job but remains free to seek another. Roth. Mertens was not dismissed for cause and no such stigma exists. For good or ill, Mertens original employment was a product of the political patronage system. Her dismissal was the result of the operation of the same system. Considering her original pleading in the light most favorable to her, she has failed to state a claim upon which relief can be granted.

The obvious purpose of notice pleading is to notify the opposing party of the basic factual situation and the essential elements of the claim. The function of giving notice is to formulate the true issues without the requirement that they detail every fact. The complaint is the first step in giving notice of the matters in controversy and the objective sought is their development by pleading only so far as necessary to delineate the true issues in the action. The theory behind this procedure is that the facts shall be developed by discovery and trial and not by comprehensive statements thereof in the complaint or other pleadings. A fair summary of the operative facts should be stated directly, accurately and adequately. The purpose of Kentucky Civil Rule 8.01 is to require a short and plain statement of the claim sufficient to give the defendant fair notice of the claim and the grounds upon which it is based.

It is frequently impossible to isolate fact from conclusion. The important ultimate fact is ordinarily a conclusion based upon evidentiary facts. Whether a pleading states facts or conclusions is not the

important consideration. The vital issue in determining the accuracy of a pleading is whether it is sufficiently definite to give fair notice to the opposing party of the precise nature of the claim presented.

We recognize that a complaint should not be dismissed unless it appears to a certainty that the claimant would not be entitled to relief under any state of facts which could be proved in support of her claim. Ewell v. Central City, Ky., 340 S.W.2d 479 (1960). Moreover, a judgment on the pleadings should be granted only if on the facts, the moving party is clearly entitled to a judgment. Spencer v. Woods, Ky., 282 S.W.2d 851 (1955). When considering a motion to dismiss, the pleading should be liberally construed in a light most favorable to the plaintiff and all allegations in the complaint are to be taken as true. CR 12.02(f); Gall v. Scroggey, Ky.App., 725 S.W.2d 867 (1987). In addition, the complaint can be stated in conclusions if it provides the other party with sufficient notice. Pierson Trapp Company v. Peak, Ky., 340 S.W.2d 456 (1960). Nevertheless, putting aside the facial appeal of this type of claim, we believe that the result achieved by the trial court and the Court of Appeals was correct even though they may have been based on the wrong reasons as now determined by the United States Supreme Court. Sufficient reason does exist under the application of appropriate and longstanding Kentucky principles of civil procedure for notice pleading to sustain the dismissal.

The decision of the Court of Appeals is affirmed.

Stephens, C.J., and Lambert, Reynolds, Spain and Wintersheimer, JJ., concur. Leibson, J., dissents with a separate opinion in which Combs, J., joins.

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SUPREME COURT OF KENTUCKY
90-SC-778-DG

PATRICIA A. MERTENS — APPELLANT

ON REVIEW FROM COURT OF APPEALS
V. 89-CA-1829
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WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually, and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity — APPELLEES

DISSENTING OPINION BY JUSTICE LEIBSON

Respectfully, I dissent.

This case involves the constitutionality of the process by which Mertens, the Director of the Division of Child Support Enforcement in the Cabinet for Human Resources, was discharged. Issues of this nature should merit oral argument and a published opinion because they affect the way in which we operate our state government and should be of general interest to every citizen of this state.

Nevertheless, I would not vote to publish this opinion for several reasons.

Firstly, our decision is squarely in conflict with Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), and the mandate from the U.S. Supreme Court vacating our previous decision and remanding to us to reconsider "in light of Leatherman."

Worse yet, if published, much of what is written here would unsettle settled law about what must be stated in a claim for relief, i.e., what is necessary in a complaint to comply "with the liberal system of 'notice pleading' set up by the federal rules [Rule 8(A)(2)]" and the Kentucky rule to the same effect (CR 8.01). See Leatherman, 122 L.Ed.2d at 524. One needs only to check the officially sanctioned "Appendix of Official Forms" provided with the Kentucky Rules of Civil

Procedure[1] to see the problem. As stated in Bertelsman & Philipps, Ky. Prac., 4th Ed., Civil Rule 8.(3), p. 145:

> "All that is necessary is that a claim for relief be stated with brevity, conciseness and clarity. A complaint is not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of the allegations [citing Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 8 (1957); Morgan v. O'Neil, Ky., 652 S.W.2d 83 (1983)]."

Those well-meaning attorneys who argue that all opinions of our Court should be published would do well to reflect upon how, if published, some of the language in this Opinion would revive questions over what is necessary to state a claim for relief, questions which most practicing lawyers thought were laid to rest over thirty years ago.

Mertens sued Wallace G. Wilkinson, Kentucky's Governor, individually and in his official capacity, Harry J. Cowherd, M.D., Secretary of the Cabinet for Human Resources, individually and in his official capacity, and others, alleging, inter alia, that she was discharged for

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[1]For example:

"Form 5. COMPLAINT FOR MONEY LENT.

Defendant owes plaintiff ten thousand dollars for money lent by plaintiff to defendant on June 1, 1950."

"Form 8. COMPLAINT FOR NEGLIGENCE.

1. On June 1, 1960, on a public highway called Capital Avenue in Frankfort, Kentucky, defendant negligently drove motor vehicle against plaintiff who was then crossing said highway

"her political beliefs" violating "the First and Fourteenth Amendments to the U.S. Constitution," asserting a cause of action under the Federal Civil Rights Act, 42 U.S.C. §1983. Mertens' complaint alleged Governor Wilkinson took office on December 8, 1987, and she was discharged from her position as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources on January 29, 1988, without cause. The issue stated by her complaint was whether the plaintiff's discharge was politically motivated and infringed her first amendment rights of free speech and association.

The motion to dismiss was based, not really on the insufficiency of the complaint, but on the position taken by the defendants, which was that Mertens held a policymaking position and therefore was subject to replacement for purely political reasons. The parties do not dispute the controlling principle of law on this subject, which is as stated by the U.S. Supreme Court in Branti v. Finkel, 445 U.S. 507, 518, 100 S.Ct. 1287, 63 L.Ed.2d 574, 584 (1980):

> "...the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

The issue raised at the trial level by the defendants' CR 12.02(f) motion to dismiss was "failure to state a claim upon which relief can be granted." The trial court granted the motion with leave of court to plaintiff to amend and expand the original complaint. She complied by filing an amended complaint with even more detailed factual allegations intended to

explain why the plaintiff believed she was discharged purely because she participated in a faction politically opposing Wilkinson's candidacy for the Democratic Party's nomination for Governor of Kentucky. The trial

court sustained a second CR 12.02(f) motion, and dismissed the complaint.

The plaintiff had sent out sets of interrogatories and requests for production of documents to four different defendants seeking information to sustain her position. The motion to dismiss was granted before the defendants were required to answer the complaint, and relieved them of responsibility to respond to the plaintiff's efforts at discovery.

The primary reason stated for dismissal at both the trial level and on appeal was a so-called "heightened pleading requirement" replacing the so-called "notice pleading" standard that otherwise applies to all pleadings stating a claim for relief under both the Federal and Kentucky Rules of Procedure. Our Kentucky courts assumed this "heightened pleading requirement" applied when stating a cause of action under the Civil Rights Act, and dismissed Mertens' complaint for this reason. As the trial court stated:

> "Plaintiff is required to state a claim in terms of facts rather than conclusions. ...[H]aving been made aware of this Court's requirement that heightened pleading requirements be met in order to state a claim, Plaintiff has not done so....Further the Court does not feel compelled to assume that a position of Division Director is not a policymaking position when Plaintiff has provided nothing other than her own conclusions to refute the presumption created by the statutory inclusion of division director positions in the unclassified service. Upon this ground Plaintiff's Complaint is dismissed."

Thus the trial court recognized the question as to whether the plaintiff held a policymaking position was sufficiently presented, but ruled that plaintiff had not yet pled sufficient facts to sustain her position on this issue.

Our Court agreed with the trial court in our previous Memorandum Opinion rendered herein on January 16, 1992:

> "The circuit court and the Court of Appeals in this case found that Mertens failed to meet the pleading requirement involved in Section 1983 cases. Mertens argues that the courts applied too strenuous a pleading requirement and should have applied a simple notice pleading requirement. We believe the standard applied was the correct pleading requirement."

The position taken by our Kentucky courts has now been overruled on this point by the U.S. Supreme Court in Leatherman v. Tarrant County, supra, decided March 3, 1993. Leatherman states:

> "We granted certiorari to decide whether a federal court may apply a 'heightened pleading standard'--more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure--in civil rights cases...." 122 L.Ed.2d at 522.
>
> * * * * *
>
> "Respondents reason that a more relaxed pleading requirement would subject municipalities to expensive and time consuming discovery in every § 1983 case, eviscerating

their immunity from suit and disrupting municipal functions.

This argument wrongly equates freedom from liability with immunity from suit. Id. at 523.

Leatherman cites with favor:

"Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 624 (CA 9, 1988), ('a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.')" Id. at 522.

On March 8, 1993, the U.S. Supreme Court granted Mertens' Petition for Writ of Certiorari challenging our final decision in this case. The U.S. Supreme Court "vacated" the judgment of this Court, and "remanded" to this Court "for further consideration in light of Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. ___ (1993)."

We have not complied with this mandate because there is not distinction between this case and the Leatherman case to justify a different result.

In Leatherman there was nothing more than the bare allegation that the municipality had failed "adequately to train the police officers involved," and this bare allegation was held sufficient to withstand a motion to dismiss, and permit plaintiff discovery. The controlling issue in the present case involves nothing more than the defendants' claim in defense of the complaint that they are relieved from the liability which would

otherwise attach because, as they claim, the plaintiff held a policymaking position. This is an affirmative defense which turns on "whether the hiring authority can demonstrate that party affiliation [or, as here, political affiliation with a different faction within the party] is an appropriate requirement for the effective performance of the public position involved." Branti v. Finkel, quoted supra. The defendants here were on notice as to the nature of the claim stated against them, and the question was whether the evidence, which was never developed, would sustain their defense. To paraphrase Leatherman, quoted supra, the trial court's decision (which we affirm) "wrongly equates freedom from liability with immunity from suit."

Our Court painstakingly decides the merits of the question involved when there is no evidence one way or another. It decides the issue as an abstract question of law based on various statutory provision regarding the subject of "State Personnel" provided in the Kentucky Revised Statutes, Ch. 18A. The statutes cited do not specify this plaintiff holds a policymaking position, one where she may be fired at will for political beliefs or being part of an opposing political faction. At most they raise a question as to whether her department head should have certified her position to the Personnel Board as one where the "duties are nonpolicymaking in their nature." KRS 18A.170-.175.

KRS 18A.170 (headed "Certification of division directors who do not make policy") recognizes that a division director's duties are to be examined for the purpose of determining "whether or not, as a matter of

fact, such duties are nonpolicymaking in their nature" (emphasis added).[2]

Once made, the determination in subject to agency and judicial review, but it is the duty of the department head (not the division director) to initiate the proceeding. While it is conceded that here the position was not certified, the real issue is whether it ought to have been. That issue cannot be resolved absent evidence beyond the pleadings.

Certainly the action or nonaction taken by the department head in this respect is not conclusive, nor is it exclusive of other evidence bearing on the nature of the position. At any rate, the question before us is not whether the defendants will be entitled to a summary judgment after discovery has been completed or will be entitled to a directed verdict after the proof is in at trial. The question is whether these defendants are entitled to have this Complaint dismissed on grounds it fails to state a cause of action.

The answer should be obvious, notwithstanding the Majority Opinion reaches a different conclusion. The Complaint was dismissed under standards for "heightened pleading" requirements in civil rights cases which no longer exists.

I disagree, and dissent.

Combs, J., joins.

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[2]KRS 18A.175 provides a parallel proceeding for decertifying division directors whose duties have become policy making. It is evident that the legislature foresaw that a division director's duties, and with them status, may change from time to time.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 8, 1993

Mr. William C. Jacobs
173 North Limestone Street
Lexington, KY 40507

Re: Patricia A. Mertens
v. Wallace G. Wilkinson, etc., et al.
No. 92-96

Dear Mr. Jacobs:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Kentucky for further consideration in light of Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U. S. ------ (1993).

Very truly yours,
/s/ William K. Suter
William K. Suter, Clerk

RENDERED: January 16, 1992
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
90-SC-778-DG

PATRICIA A. MERTENS — APPELLANT

ON REVIEW FROM COURT OF APPEALS

V. 89-CA-1829

FRANKLIN CIRCUIT COURT NO. 89-CI-98

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually, and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a decision of the Court of Appeals which affirmed a dismissal by the Franklin Circuit Court of Mertens' complaint for failure to state a claim for which relief may be granted pursuant to CR 12.02(f).

Mertens was hired by the Cabinet for Human Resources on April 1, 1987, as the Division Director of Child Support Enforcement. Under K.R.S. 18A.115(i), the position of Division Director is unclassified unless certified for classification pursuant to K.R.S. 18A.170. Mertens admits in her complaint that her position was unclassified. An individual holding an unclassified position is subject to dismissal upon written notice by the appointing authority "for cause, or without cause." 101 KAR 3:050(3). Mertens was dismissed from her position on January 22, 1988. She admits that her dismissal was without cause.

On January 20, 1989, Mertens filed this action pursuant to 42 U.S.C. §1983 in Franklin Circuit Court alleging violation of her constitutional rights under the First and Fourteenth Amendments. She claims that she was terminated from her unclassified position with the Cabinet for Human Resources because she was an appointee in the administration of Governor Martha Layne Collins and did not support Wallace Wilkinson during his gubernatorial campaign. Specifically, she alleged in her original complaint that "a substantial or motivating factor . . . or the sole reason for the discharge of plaintiff by defendants . . . was her political beliefs."

The circuit court dismissed Mertens' original complaint with leave to amend "to state nonconclusory allegations of evidence of unconstitutional motive or intent." Mertens' subsequent complaint was dismissed on the basis that it again failed "to state a claim in terms of facts rather than conclusions." The Court of Appeals in a 2-1 decision affirmed the circuit court. We affirm the Court of Appeals.

Mertens argues that her complaint stated a claim for which relief may be granted because under Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), discharging a public employee solely because of the employee's political affiliation when political affiliation is not a requirement for the effective performance of that position, and where the employee had satisfactorily performed the job, is violative of the First Amendment and also made applicable to state employees through the Fourteenth Amendment.

It is clear that the First Amendment forbids discharge of public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. Rutan v. Illinois, ___ U.S. ___, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), Branti v. Finkel, supra; Elrod v. Burns, 427 U.S. 347. 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, the U.S. Supreme Court stated in Rutan that a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high level employees on the basis of

their political views. S.Ct. at 2737, L.Ed.2d at 66, citing Elrod v. Burns, supra.

We believe it is clear that Mertens' position, that of Division Director of Child Support Enforcement, is a significant, high-level position in the state government system. Only the Commissioner for Social Insurance and the Secretary of the Cabinet for Human Resources were closer to the Governor in the ranking system. It also involves supervisory duties of more than two hundred employees. The civil service laws embodied in Kentucky's statutory system clearly define the position as "policy-making." Division directors who are considered policy makers are not certified. If a division director disagrees, a hearing is held. The Division Director of Child Support Enforcement is not a certified position. Clearly, it is in choosing or dismissing individuals at this high-level of service that enables an administration to further the goals and implement the policies for which it was elected.

There is no merit in Mertens' contention that Branti v. Finkel, supra, compels a different result. The plaintiffs in Branti held only entry level positions. None of the political patronage cases cited by Mertens dealt with the high level office involved here.

The circuit court and the Court of Appeals in this case found that Mertens failed to meet the pleading requirement involved in a § 1983 case. Mertens argues that the courts applied too strenuous a pleading requirement and should have applied a simple notice pleading requirement. We believe the standard applied was the correct pleading requirement.

In order to state a cause of action under § 1983, the plaintiff must have alleged that the defendant, acting under color of law, deprived her of some right, privilege or immunity secured by the Constitution. Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed 1324 (1943); Poe v. Hayden, 853 F.2d 418 (6th Cir. 1988).

In evaluating allegations of wrongful discharge in a § 1983 action, the defendant's motive must be ascertained. Tanner v. McCall, 625 F.2d 1183, 1193 (5th Cir. 1980). In determining motive, courts have consistently required more than a mere claim of the defendant's discriminatory intent. Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984); Haas v. Barren Co. Sheriff's Dept., 658 F.Supp. 877 (W.D. Mich. 1987). All of the federal circuit courts require this. Hobson, supra at 29-30.

A pleading will not be sufficient to state a cause of action under §1983 if its allegations are only conclusions. Place v. Shephard, 446 F.2d 1239, 1244 (6th Cir. 1971). Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971); Chapman v. City of Detroit, 808 F.2d 459 (6th Cir. 1986).

Mertens has stated that she was placed in the office of Division Director of Child Support Enforcement by former Governor Martha Layne Collins. She states when Collins was succeeded by Wilkinson, he replaced her with a member of his "political faction." Mertens does not allege that she publicly supported anyone in the Democratic primary or that she opposed the Wilkinson faction of the Democratic party. There is no allegation that she publicly criticized

the Wilkinson Administration, much less that she was replaced for such criticism.

The position of Division Director of Child Support Enforcement is unclassified by statute. KRS 18A.115(I). Mertens was subject to dismissal upon written notice by the appointing authority "for cause or without cause." 101 KAR 3:050(3). In stating her case, Mertens merely states that her discharge was done with unconstitutional motive.

Mertens cites Howlett v. Rose, ___ U.S. ___, ___ S.Ct. ___, 110 L.Ed. 2d 332 (1990) for the proposition that when a state court is charged with the responsibility of enforcing federal law, the state court must follow its regular mode of procedure. Therefore, in this instance, a notice pleading is sufficient. We do not agree. Pleading in federal courts, as in this Commonwealth, is notice pleading. It is only in actions brought pursuant to § 1983, where motive is the issue, that heightened pleading standards are mandated. The mere fact that state court claims do not require pleading with specificity is totally irrelevant to the issue of a §1983 pleading.

We take note of our recent decision in Martin v. Corrections Cabinet, ___ S.W.2d ___ (1991), which also involved an unclassified employee, who also alleged that she was terminated from her state job for political reasons. The case here is distinguishable in several respects. The plaintiff in Martin claimed that she was discharged for her attempt to discipline a politically influential classified employee. Mertens alleges she was removed solely because she did not support Wilkinson during the gubernatorial campaign.

The primary difference is that an unclassified or nonmerit employee who alleges that she was terminated for enforcing the legal prohibition against political favoritism in administration of the merit system, has a right to appeal to the Personnel Board under KRS 18A.095(9) and 18A.095(14)(9). KRS 18A.095(9) permits an unclassified employee dismissed "for cause" to file an appeal with the Personnel Board. Mertens admitted in her complaint that her dismissal was without cause.

The governor in this instance had a right to select a Director of child Support Enforcement he could count on to carry out the policies of his administration under Branti, Elrod and Rutan. A person serving in a significant policy-making position such as the Director of Child Support Enforcement can be appointed or dismissed solely on the basis of his political views. Mertens failed to state a claim under the requirements of the Civil Rights Act and therefore has no legal recourse to protest her discharge from employment.

Mertens has had sufficient opportunity to meet any standard of pleading requirements provided by law and there is no reason to give further leave to amend this complaint.

The decision of the Court of Appeals is affirmed.

All concur.

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RENDERED: September 7, 1990; 3:00 p.m.
NOT TO BE PUBLISHED
COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 89-CA-1829-MR

PATRICIA A. MERTENS — APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT
HON. JOYCE M. ALBRO, JUDGE
ACTION NO. 89-CI-098

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually, and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity — APPELLEES

AFFIRMING

* * * * * * * * *

BEFORE: HOWERTON, CHIEF JUDGE, HOWARD, and McDONALD, JUDGES.

HOWARD, JUDGE. Appellant appeals from the dismissal by the Franklin Circuit Court of her complaint under 42 U.S.C. §1983 against the appellees. The Franklin Circuit Court dismissed her complaint pursuant to CR 12.02(f) for failing to state a claim for which relief can be granted.

Mertens became employed as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky on April 1, 1987. This position as a division director is listed by statute, KRS 18A.115, as a nonclassified position. There was no contract accompanying her employment. At the time she obtained this position, the governor of Kentucky was Martha Layne Collins.

She continued in this position until January, 1988. In the interim, Governor Collins' term expired, and Wallace Wilkinson was elected governor and took office in December, 1987. On January 22, 1988, the appellant was informed through a letter from the Executive Director of the Cabinet for Human Resources that her services would no longer be needed after the close of business on January 29, 1988. The letter bluntly stated that she would be terminated on that date. No cause was given for this termination.

On January 20, 1989, the appellant filed a complaint, under 42 U.S.C. §1983, against Governor Wallace G. Wilkinson and Secretary of the Kentucky Cabinet for Human Resources, Mr. Harry J. Cowherd, both individually and in their official capacities. She also filed suit against Thomas Greenwell, Commissioner of Personnel, and Frank Willey, Acting Executive Director of Personnel Management. Both of these appellees were sued in their official capacities only. In this complaint, appellant alleged that a substantial factor and reason for her discharge was that she failed to support the new governor during the previous election. She contended that her right to freedom of speech and political beliefs under the First and Fourteenth Amendments to the United States Constitution had been violated. She sought compensatory damages for lost earnings, embarrassment, humiliation, and emotional and mental distress that she allegedly suffered. She also sought punitive damages against Wilkinson and Cowherd. Additionally, she sought injunctive relief as she sought to be reinstated to her former employment at the level of compensation and benefits she would have been earning had she still been employed. She further sought costs including reasonable attorney's fees pursuant to 42 U.S.C. §1988.

The appellees moved to dismiss the claim under CR 12.02(f) due to their belief that appellant had failed to state a claim upon which relief can be granted and under the doctrine of sovereign immunity. After a hearing on this motion, the Franklin Circuit Court

granted the motion, but gave appellant ten days to amend her complaint.

The amended complaint also became the subject of a motion to dismiss pursuant to CR 12.02(f). After a hearing, the Franklin Circuit Court entered an order dismissing appellant's complaint for failing to state a claim for which relief can be granted. Appellant subsequently made a motion pursuant to CR 59.05 which the court overruled. This appeal followed.

This action has been properly presented to the Franklin Circuit Court and now to this Court under 42 U.S.C. §1983. An action under 42 U.S.C. §1983 may properly be presented in a state court. Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed.2d 555 (1980); Martinez v. California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); Sowders v. Adkins, Ky., 646 S.W.2d 344 (1983). See also Board of Trustees of the University of Kentucky v. Hayse, Ky., 782 S.W.2d 609 (1989).

In the instant case, some question surrounds whether the parties were properly pleaded. 42 U.S.C. §1983 provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The meaning of "person" within this statute has been the subject of much debate and litigation. The United States Supreme Court in Will v. Michigan Department of State Police, U.S. , 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989), has held that neither a state nor a state official acting in his or her official capacity are persons within the meaning of §1983. The Court ruled that the traditional principles of sovereign immunity and the history of §1983 commanded such a result. The Court ruled that a suit against a state official acting in his or her official capacity is not a suit against the official but is really a suit against the official's office. This is basically a suit against the state itself. Will, supra, at 2311. See also Kentucky v. Graham, 473 U.S. 159, 105 S. Ct. 3099, 87 L.Ed.2d 114 (1985). A state official, however, when sued in his or her official capacity for injunctive relief would be a person under §1983 because official capacity actions for prospective relief are not treated as actions against the state. Will, supra, at 2311.

It is important to once again distinguish between §1983 suits brought against a person individually and an official acting in his or her official capacity. A personal capacity suit is brought to impose personal liability upon a governmental official for actions he or she took under color of state law and which violate another person's constitutionally protected rights. Kentucky v. Graham, supra, at 3105. This person may be carrying out the duties of his or her job but still engages in a personal wrongdoing and may be held liable. Hayse, supra, at 615. An official capacity suit is generally another way of bringing an action against

an entity of which the officer is an agent. Graham, supra. It is often an action trying to hold the official vicariously liable for acts of subordinates in which the official was not directly involved or for the state's policies. Hayse, supra, at 615. Such official actions and vicarious liability are not allowable under §1983. Will, supra, Hayse, supra.

In the instant case the appellant has properly brought her §1983 claims against Wilkinson and Cowherd individually and against all appellees for injunctive relief. She cannot bring an action against the state officials acting in their official capacities pursuant to Will, supra.

The Franklin Circuit Court in its opinion stated that the appellant failed to avail herself of state administrative remedies that were available to her, and as a result her §1983 claim, based upon deprivation of liberty interests, had to be dismissed. While we uphold the trial court's decision on other grounds, we do not believe that the appellant erred by bringing her §1983 action in Franklin Circuit Court. After reviewing the applicable statutes and regulations, we cannot find that appellant had another remedial avenue open to her through any of the statutes or regulations cited by the appellees or the trial court.

KRS 18A.095(9) applies to the appellant's situation. It states:

> Any unclassified employe who is dismissed, demoted, suspended, or otherwise penalized for cause may, within thirty (30) days after such dismissal, demotion, suspension, or other form of penalization, appeal to the board for review thereof.

In the instant case, by the appellees' own admission, appellant was fired without cause, so she is afforded no relief under this provision. KRS 18A.095(14)(a) is designed to afford relief only to classified state employees on a register. Additionally, 101 KAR 1:370 §1(3) is contingent by its own terms upon 101 KAR 1:350. 101 KAR 1:350 §16 specifically governs appeals by unclassified employees. Subsection 1 of that provision again states that any unclassified employee who is dismissed, demoted, or suspended, or otherwise penalized for cause may appeal to the personnel board for review pursuant to the applicable section of this regulation. Once again the avenue for a remedy to appellant has been closed as she was not dismissed for cause. In the instant case, appellant properly brought her action before the Franklin Circuit Court.

The Franklin Circuit Court in this case found that the appellant failed to meet the pleading requirements involved in a §1983 case, and accordingly granted the appellee's motion under CR 12.02(f) to dismiss appellant's action for failure to state a claim upon which relief can be granted. Appellant has argued that the Franklin Circuit Court applied too strenuous a

pleading requirement and should have applied a simple notice pleading requirement. She contends that she easily met the notice pleading requirements. We believe the Franklin Circuit Court applied the correct pleading requirements.

Appellant bases her argument on several Kentucky cases which have addressed pleading requirements in various fact patterns. It is true that under Kentucky's notice pleading rules, a pleading should not be construed against the pleader, and the complaint should not be dismissed unless it appears to a certainty that the claimant would not be entitled to relief under any state of facts which could be proved in support of her claim. Ewell v. Central City, Ky., 340 S.W.2d 479 (1960); Spencer v. Woods, Ky., 282 S.W.2d 851 (1955); Pierson Trapp Company v. Peak, Ky., 340 S.W.2d 456 (1960). Further, under general principles of Kentucky law, a judgment on the pleadings can be granted only if on the facts, the moving party is clearly entitled to a judgment. Spencer, supra. When considering a motion to dismiss under CR 12.02(f), the pleadings should be liberally construed in a light most favorable to the plaintiff, and all allegations in the complaint taken to be true. Gall v. Scroggy, Ky. App., 725 S.W.2d 867, 869 (1987). See also Christian v. Belcher, 888 F.2d 410 (6th Cir. 1989). Under general Kentucky rules, the complaint can be stated in conclusions if it provides the other parties with sufficient notice. Pierson Trapp Company, supra, at 460.

In cases alleging deprivation of constitutional rights however, the claimant must meet certain requirements

in her pleadings. Two elements are essential for stating a claim under §1983; the objectionable conduct must have been committed under the color of state law, and the claimant must have been deprived of a right, privilege or immunity protected by the United States Constitution. Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928 (6th Cir. 1987). The requirements for asserting constitutional deprivations in §1983 claims are the same for those establishing the underlying constitutional violations. Gutierrez v. Municipal Court of The Southeast Judicial District, County of Los Angeles, 838 F.2d 1031 (9th Cir. 1988). In cases involving a claim that the defendants acted with an unconstitutional motive, the plaintiff must in her pleadings provide nonconclusory allegations of evidence of this intent in order for her to proceed to discovery on this claim. All of the federal circuit courts require this. Hobson v. Wilson, 737 F.2d 1, 29-30 (D.C. Cir. 1984). This is in keeping with principles established by the United States Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). The allegations in the complaint will have to be sufficiently precise to place the defendants on notice of the claim's nature and to enable them to prepare a response. Hobson, supra, at 29. A pleading will not be sufficient to state a cause of action under the Civil Rights Act if its allegations are but conclusions. Place v. Shepherd, 446 F.2d 1239, 1244 (6th Cir. 1971). See also Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971); Chapman v. City of Detroit, 808 F.2d 459 (6th Cir. 1986). Complaints containing only

conclusory, vague, or general allegations of actions to deprive someone of constitutional rights should be dismissed. Ostrer v. Aronwald, 567 F. 2d 551 (2d Cir. 1977).

These tests should be met in constitutional cases to avoid ushering the defendants into discovery where the plaintiffs have no hope of success on the merits. This rule should not be applied too rigidly, however. The United States Supreme Court in Harlow required that mere conclusory allegations of unconstitutional motive, devoid of factual support, must be found lacking and be dismissed. Hobson, supra, at 31. It is necessary to apply the above principles to the specific allegations of appellant's claim.

Appellant in her §1983 claim has asserted that certain rights guaranteed to her through the Fourteenth Amendment of the United States Constitution have been violated. The Fourteenth Amendment, Section 1 provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In this case, appellant has primarily contended that her First Amendment rights to freedom of speech have been violated. There is also some indication that she believed she was deprived of property or other liberty when she was dismissed from her position. We will briefly address the latter two points first.

It is important to see if an interest is within the Fourteenth Amendment protection of liberty and property. The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that an individual has acquired in specific benefits. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972). Property interests are created and defined by existing rules and understandings that stem from state law or contracts between the parties. Roth, supra, at 2709. "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." Bishop v. Wood, 426 U. S. 341, 96 S. Ct. 2074, 2077, 48 L.Ed.2d 684 (1976).

Determining whether an employer has granted the employee any form of guarantee must be decided from examining the particular statute or ordinance. Bishop, supra. Where neither the terms of a claimant's appointment nor any statute or law secured any entitlement or interest in re-employment, the claimant has not established a property interest sufficient under the Fourteenth Amendment to entitle the claimant to a hearing concerning her re-employment. Roth, supra, at 2710.

In the instant case, appellant had no property interest in retaining her position because under Kentucky law, her position was not classified. There was no contract accompanying her employment. She served as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources.

KRS 12.050 specifically states that directors of divisions shall be appointed by heads of departments with the written approval of the governor. KRS 18A.115(i) also states that division directors are not included under classified service. 101 KAR 3:050 (3) further holds that an unclassified state employee may be dismissed by the appointing authority upon written notice for cause or without cause. Under 101 KAR 3:050(1), employees in executive policymaking positions serve at the pleasure of the appointing authority. As stated earlier, under 101 KAR 1:350 §16(1) only an unclassified employee who is dismissed for cause may appeal to the personnel board for review. Thus, after reviewing the terms of appellant's position and the applicable Kentucky statutes, it is clear appellant has shown no sufficient property interest in her position.

Appellant also was not deprived of any liberty interest when she was dismissed. A liberty interest in an employment setting is invoked when the employee's dismissal recognizes a stigma or disability that forecloses other employment possibilities. Roth, supra, at 2707. There must be untruths published about the employee, and these statements must prevent her from securing further employment. Roth, supra. See Cleveland Board of Education v. Loudermill, 470 U. S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985). A person is not deprived of liberty when she is simply not rehired in one job but remains as free as before to seek another. Roth, supra, at 2708.

Appellant was deprived of no such interest in the instant case. She was not dismissed for cause, and no such stigma exists.

Appellant in her §1983 complaint has asserted that appellees deprived her of her First Amendment freedoms of speech. It is fundamental that rights secured by the First Amendment against abridgement by the United States are secured to all persons by the Fourteenth Amendment against abridgment by a state. Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L.Ed 1093 (1940). Infringement of First Amendment rights clearly are actionable under §1983 claims.

It has also been generally held that an employee who is not tenured or has no guarantee of re-employment may not be denied his or her job on a basis that infringes on the employee's constitutionally protected interests such as the First Amendment freedom of speech. Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977).

In proving a First Amendment claim, the claimant must show that her conduct or speech was constitutionally protected by the First Amendment, and that this conduct was a substantial factor in the employer's decision not to rehire the employee. Mt. Healthy, supra, at 574. Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S. Ct. 693, 58 L.Ed.2d 619 (1979). These components should be demonstrated through sufficient factual

allegations. Douglas v. City of Jeannette, 319 U.S. 157, 63 S. Ct. 877, 87 L.Ed. 1324 (1943). The factual proof of the unconstitutional motive in such a case must also be pleaded. Hobson, supra. These pleadings are important to allow the employer a chance to rebut the contentions.

The United States Supreme Court has additionally considered the impact of political patronage systems upon employees' First Amendment freedoms in at least two cases, Branti, supra and Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). The Court has clearly held that the right to associate with the political party of one's choice is an integral part of the First Amendment freedoms of belief and association. Elrod, supra, at 2681. A public employee is protected by the First Amendment from discharge based on what she has said and based on what she believes. Branti, supra, at 1293. The Court in Branti and Elrod held that political patronage systems in some cases where they compel or restrain belief are violative of the First Amendment.

The Court in Elrod applied the classic First Amendment test and held that if political patronage hirings and dismissals are to survive constitutional scrutiny, they must further some vital end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. Elrod, supra, at 2685. The Court found that dismissing non-policy making employees failed this test, but that party affiliation may be an acceptable requirement for some types of government

employment. Branti, supra, at 1294. The Court further held that there is a government interest in furthering public policy provisions and in government efficiency and effectiveness. It held that that interest can be fully satisfied by limiting patronage dismissals to policy making positions. Elrod, at 2689. The ultimate inquiry is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. Branti, supra, at 1295.

The Supreme Court further outlined some of the factors to determine whether such a job fits the above description. Some of these include the nature of the responsibilities, the broadness of the scope of the responsibilities, and whether the employer acts as an advisor in certain matters. Elrod, supra, at 2687.

In the instant case, we find that the appellant has failed to meet her burden of showing that the appellees infringed upon her First Amendment rights. She has not asserted any conduct, speech, or belief that was constitutionally protected, nor has she shown that the appellees decided to dismiss her because of any such conduct.

Her job in this case by statute was nonclassified and by statute and regulation she could be dismissed for cause or without cause. The General Assembly apparently intended her job to be considered as a policy making position. She was the director of the division for enforcement of child support, and in this position would have authority over others and would have influence over her division's activities. The claimants in Elrod and Branti were clearly not

policymaking employees. Thus, she has failed to show that she falls within the prohibitions of these cases.

She was a member of the Democratic Party and her replacement was a Democrat. She has not adequately shown by facts what activities or conduct she undertook that would have been protected speech nor has she shown the intent of the appellees to deprive her of this right. This distinguishes the instant case from the other cases cited by appellant - specifically Elrod and Branti. This case is also distinguishable from Sindermann and Mt. Healthy where the claimants were able to factually show constitutionally protected conduct that the employer used to retaliate against the employee.

Even considering the pleadings in the light most favorable to the appellant, she has failed in this case to state a claim on which relief can be granted. The decision of the Franklin Circuit Court is affirmed.

CHIEF JUDGE HOWERTON CONCURS. McDONALD, JUDGE, DISSENTS.

McDONALD, JUDGE, DISSENTING. I dissent from the majority's holding that the complaint was inadequate and that Mertens "failed to meet her burden of showing that the appellees infringed upon her First Amendment rights." When an action is brought in state court to enforce rights or claims under federal law, the Supremacy Clause of the United States Constitution perforce requires that federal law be applied by the state court. See Maine v. Thiboutot, 448 U.S. 1, 11, 100 S. Ct. 2502, 2508, 65 L.Ed.2d 555 (19890). However, in its exercise of concurrent

jurisdiction of such actions, the state's procedural rules are applicable unless those rules are being used to defeat the rights granted by Congress or the Constitution. Brown v. Western Railway of Alabama, 338 U.S. 294, 296, 70 S. Ct. 105, 106, 94 L.Ed.2d 100 (1949). These concepts were recently reiterated in Howlett v. Rose, ____ U.S. ____, 58 U.S.L.W. 4755 (decided June 11, 1990), thusly:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum--although both might well be true-- but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to thier regular modes of procedure. Id. at 4758 [emphasis added].

The majority has set out the well-settled principles applicable to notice pleading in this Commonwealth, which, if applied to this case, in my opinion, require reversal of the trial court's dismissal. Those principles are that in ruling on a motion for failure to state a claim, the pleadings should be liberally construed in a light most favorable to the plaintiff, all allegations in the complaint must be considered to be true, and the motion must be dismissed "unless it appears the plaintiff would not be entitled to relief under any state of facts which could be proved in support of her

claim." Ewell v. Central City, Ky., 340 S.W.2d 479, 481 (1960), and Gall v. Scroggy, Ky. App., 725 S.W.2d 867 (1987).

The heightened pleading requirement of factual specificity imposed by some of the lower federal courts and applied by the majority of this panel simply does not comport to our procedural rules. All CR 8.01 requires is a "short and plain statement of the claim showing that the pleader is entitled to relief . . . . It is immaterial whether the complaint states 'conclusions' or 'facts' as long as fair notice is given." Pierson Trapp Company v. Peak, Ky., 340 S.W.2d 456 (1960).

Although §1983 litigation can become quite complex, the complaint need establish only two things. "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L.Ed.2d 572 (1980). A cursory review of Mertens' complaint shows that her allegations easily fall within the parameters of Gomez and CR 8.01 and adequately states a claim for relief.

In my opinion the trial court clearly abused its discretion in dismissing the plaintiff's action. I would reverse and remand for further proceedings.

ATTORNEY FOR APPELLANT:
William C. Jacobs
Lexington, Kentucky

ATTORNEYS FOR APPELLEES:

Ryan M. Halloran
Chief Counsel - Office of Counsel
Cabinet for Human Resources

Trisha Zeller James
Office of the Counsel
Frankfort, Kentucky

F I L E D
MAR 29 1989
FRANKLIN CIRCUIT COURT
JANICE MARSHALL, CLERK

FRANKLIN CIRCUIT COURT
DIVISION III
ACTION NO. 89-CI-0098

PATRICIA A. MERTENS PLAINTIFF

V. ORDER

WALLACE G. WILKINSON,
Governor, et al. DEFENDANTS

On motion of defendants, Wilkinson, Cowherd, Greenwell and Willey, and the Court being sufficiently advised;

IT IS ORDERED AND ADJUDGED that defendants' Motion to Dismiss be and hereby is granted. Plaintiff is hereby given ten days in which to amend her complaint to state non-conclusory allegations of evidence of unconstitutional motive or intent.

IT IS FURTHER ORDERED that defendants' motion for a protective order is hereby granted and that no discovery in the above-styled case be taken until further order of this court.

This the 27 day of March, 1989.

/s/ Joyce M. Albro
FRANKLIN CIRCUIT JUDGE
DIVISION THREE

F I L E D
JUL -5 1989
FRANKLIN CIRCUIT COURT
JANICE MARSHALL, CLERK

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION III
ACTION NO. 89-CI-0098

PATRICIA A. MERTENS PLAINTIFF

VS. ORDER

WALLACE G. WILKINSON,
Governor, et al DEFENDANT

** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** **

This matter having come on for hearing on the 28th day of April, 1989 on Defendant's Motion to Dismiss Plaintiff's Amended Complaint and the parties having been present through counsel and the Court having reviewed the filings of record and the authorities cited therein and having conducted its research and having heard the arguments of counsel does hereby ORDER AND DECREE:

That Defendant's Motion to Dismiss is granted. As grounds for its ruling the Court states as follows:

Plaintiff, Patricia Mertens served as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources from April 1, 1987 until January

27, 1988 when she was discharged from her duties. The discharge was "without cause". All Division Director positions are exempted from the classified service by KRS 18a.115 and persons holding those positions are subject to dismissal upon written notice by the appointing authority "...for cause, or without cause". 101KAR3:050(3)

This claim is filed in state court under the provisions of 42 USC § 1983.

Plaintiff's Counsel admitted in oral arguments that Plaintiff had no property interest in her unclassified employment. Counsel stated that she seeks to protect her "political beliefs". Neither counsel nor the Plaintiff has defined the precise contours of Plaintiff's political beliefs or how they interacted with the political beliefs of the Defendants to result in her dismissal SOLELY on grounds of those beliefs. Plaintiff has never clearly indicated what her political beliefs are or how those might have been communicated to Defendants. Nor has she ever stated what response from Defendants forms the foundation for her conclusion that politics was the motive behind her dismissal. Plaintiff does not claim to have made speeches or contributions to any particular candidate nor does she present an instance when she was expected to do so for Governor Wilkinson and declined. She states only that she was appointed by Governor Martha Layne Collins.

Plaintiff relies heavily on the Branti case which was filed in federal court based upon federal constitutional rights. Plaintiff is in state court asserting federal constitutional rights which can only be applied to the state through the operation of the Fourteenth

Amendment. Without having shown a property interest in her employment which was protected by the Fourteenth Amendment, Plaintiff has failed to state a claim for 42 USC § 1983 protection in state court. Upon that ground Plaintiff's complaint is dismissed.

Plaintiff did not file nor did she attempt to file any action seeking administrative remedies. Such remedies were available to Plaintiff. If she believed the action against her was based on discrimination due to her political opinions or affiliations she could have filed a grievance with the agency. Detailed grievance procedures are set out in the regulations which include appeal rights to the Personnel Board. Under KRS18A.095(14)(a) Plaintiff could have filed a direct appeal to the Personnel Board if she believed she had been discriminated against. No grievance was filed, no action was brought before the Personnel Board. Adequate administrative remedies were available to Plaintiff. She chose not to avail herself of them. She cannot now claim deprivation of a liberty interest. Upon this ground Plaintiff's complaint is dismissed.

Plaintiff's pleadings contend that she was discharged because she did not support the Wilkinson faction of the Democratic Party and that the job was filled after her dismissal by someone who had been a Wilkinson supporter. She relies again on the Branti case which dealt with federal employees who were Republicans and who were able to make a showing that they were not in a policy making position and were able to make a showing that their discharge would be "solely for the reason that they were not affiliated with or sponsored by the Democratic Party".

Plaintiff is affiliated with the Democratic party and is complaining of the actions of a Democratic governor. She claims that the position of Director of the Division of Child Support Enforcement is not a policy making position. She further claims that factionalism within the Democratic Part was the reason for her discharge. Her counsel in oral arguments indicated an eagerness to take on the entire system of unclassified appointments. Doing so might prove to be a worthwhile undertaking but before one is entitled to call that system into question, one is required to build a base from which to launch that attack. The allegations must be more than mere conclusions or unwarranted factual inferences. Plaintiff is required to state a claim in terms of facts rather than conclusions. This Court is aware that there are certain nebulae in the protection of the Constitution. This Court does, however, require that Plaintiff outline the contours of something that is discernible in the mist. Even after having been given leave to file an Amended Complaint and having been made aware of this Court's requirement that heightened pleading requirements be met in order to state a claim Plaintiff, has not done so. The Court will not attempt to detail the leaps of logic and flights of fancy that would be required in order to find a claim stated here. Let us simply state that the Court does not feel compelled to assume along with Plaintiff, that others acted under the influence of unconstitutional motives when the few facts presented lend themselves just as easily to interpretations that carry no constitutional violation. Further the Court does not feel compelled to assume that a position of

Division Director is not a policy making position when Plaintiff has provided nothing other than her own conclusions to refute the presumption created by the statutory inclusion of division director positions in the unclassified service. Upon this ground Plaintiff's Complaint is dismissed.

Plaintiff seeks to recover personally against Defendant Wilkinson and Defendant Cowherd. Plaintiff had made no showing that those defendants acted unlawfully or in excess of their legal authority nor has she made any showing of negligent action. Any claim for negligence is outside this Court's authority and to be rightly filed only with the Board of Claims. All other claims are barred by the doctrine of sovereign immunity. Upon this ground Plaintiff's complaint is dismissed.

In short, as was previously stated, Plaintiff's Complaint is Dismissed.

Entered this 30 day of ~~May~~ June, 1989.

/s/ Joyce Albro

JUDGE, FRANKLIN CIRCUIT COURT
DIVISION III

SUPREME COURT OF KENTUCKY
90-SC-778-DG

PATRICIA A. MERTENS — PETITIONER

ON REVIEW FROM COURT OF APPEALS
V. 89-CA-1829
FRANKLIN CIRCUIT COURT NO. 89-CI-98

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually, and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity — RESPONDENTS

ORDER

The petition for rehearing is denied.

All concur.

ENTERED: April 9, 1992.

/s/ Robert F. Stephens
CHIEF JUSTICE

F I L E D
JAN 20 1989
FRANKLIN CIRCUIT COURT
JANICE MARSHALL, CLERK

FRANKLIN CIRCUIT COURT
CIVIL BRANCH
III DIVISION

PATRICIA A. MERTENS PLAINTIFF

V. COMPLAINT NO. 89-CI-00098

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually, and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity DEFENDANTS

* * * * * * * * *

Comes the Plaintiff, Patricia A. Mertens, for her Complaint herein against the Defendants, and states:

1. That Plaintiff, Patricia A. Mertens, became employed as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky on April 1, 1987;

2. That Defendant, Wallace Wilkinson, is the duly elected Governor of the Commonwealth of Kentucky, having been inaugurated on or about December 8, 1987;

3. That Defendant, Harry J. Cowherd, M.D., is the Secretary of the Cabinet for Human Resources;

4. That Defendant, Frank Willey, is the Executive Director of Personnel Management (Acting) of the Cabinet for Human Resources of the Commonwealth of Kentucky;

5. That Defendant, Thomas Greenwell, is the Commissioner of Personnel for the Commonwealth of Kentucky;

6. That on or about January 29, 1988, and without cause, Defendants discharged Plaintiff from her employment as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky;

7. That Plaintiff satisfactorily performed her job as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky;

8. That at all times complained of herein, Defendant, Wilkinson, was the head of a faction of the Democratic Party of the Commonwealth of Kentucky;

9. That neither during the gubernatorial primary of 1987, nor the gubernatorial general election of 1987 did Plaintiff support the faction of the Democratic Party of which Defendant, Wilkinson, was and is the head;

10. That neither Democratic Party affiliation nor affiliation with the faction of the Democratic Party of which Defendant, Wilkinson, is the head, is an important requirement for the effective performance of the office of Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky;

11. That on or about February 15, 1988, Defendants caused the position formerly held by Plaintiff to be filled by a member of the faction of the Democratic Party of which Defendant, Wilkinson, is the head;

12. That a substantial or motivating factor for the discharge of Plaintiff by Defendants, as aforesaid, or the sole reason for the discharge of Plaintiff by Defendants, as aforesaid, was her political beliefs;

13. That a substantial or motivating factor for the discharge of Plaintiff by Defendants, as aforesaid, or the sole reason for the discharge of Plaintiff by Defendants, as aforesaid, was the political beliefs of her replacement;

14. That Defendants are persons within the meaning of 42 U.S.C. §1983;

15. That Plaintiff is a citizen of the United States;

16. That the discharge of Plaintiff from her employment by the acts and conduct of the Defendants complained of, subjected Plaintiff to, or caused Plaintiff to be subjected to, the deprivation of rights, privileges, or immunities secured to Plaintiff by the U.S. Constitution, under color of statute, regulation, custom or usage of the Commonwealth of Kentucky;

17. That the 1st and 14th Amendments to the U.S. Constitution secure to the Plaintiff certain rights, privileges or immunities, which includes the protection against discharge from her employment by Defendants, as aforesaid, because of her political beliefs;

18. That by reason of the constitutionally impermissible conduct of the Defendants complained of, Plaintiff has been damaged by reason of having lost earnings, suffered embarrassment, humiliation and mental and emotional distress;

19. That Plaintiff ought to recover compensatory damages of Defendants, and each of them, for the injuries sustained by her, as complained of herein, all in such amounts as the trier of fact may determine are fair and reasonable, as shown by the evidence;

20. That the damages sought herein are in excess of the minimum dollar amount necessary to establish the jurisdiction of this Court;

21. That the conduct of Defendants, Wilkinson and Cowherd, complained of herein was the result of such Defendants' reckless and callous indifference to Plaintiff's federally protected rights under the 1st and

14th Amendments to the U.S. Constitution; that by reason thereof Plaintiff ought to recover of such Defendants exemplary or punitive damages in such amount as the trier of fact may determine is fair and reasonable as shown by the evidence;

22. That Plaintiff ought to be reinstated to her former employment as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky at the level of compensation, including benefits, Plaintiff would have been earning but for the constitutionally impermissible conduct of Defendants, or in the alternative, awarded front-pay in such amount as the trier of fact may determine is fair and reasonable under the evidence;

23. That Plaintiff ought to be awarded, as a part of her costs herein, a reasonable fee for her attorney under 42 U.S.C. §1988;

24. That she demands TRIAL BY JURY.

WHEREFORE, Plaintiff, Patricia A. Mertens, demands:

1. Judgment against the Defendants, and each of them,

for compensatory damages;

2. Judgment against Defendants, Wilkinson and Cowherd, in their individual capacities, for exemplary or punitive damages;

3. Judgment reinstating Plaintiff to her former employment as Director of the Division of Child Support Enforcement of the Cabinet for Human Resources of the Commonwealth of Kentucky at the

level of compensation, including benefits, Plaintiff would have been earning but for the constitutionally impermissible conduct of Defendants, or in the alternative, awarded front-pay in such amount as the trier of fact may determine is fair and reasonable under the evidence;

4. A TRIAL BY JURY;

5. Her costs herein, including a reasonable attorney's fee pursuant to 42 U.S.C. §1988; and

6. Any and all other relief to which she may be entitled.

/s/ W. C. Jacobs

WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464

ATTORNEY FOR PLAINTIFF

I, Patricia A. Mertens, state that I have read the foregoing Complaint and the allegations contained therein are true, as I verily believe.

/s/ Patricia A. Mertens

PATRICIA A. MERTENS

STATE OF KENTUCKY)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by Patricia A. Mertens on this the 20th day of January, 1989.

My Commission expires: June 13, 1989.

/s/ Rheba C. McClellan
NOTARY PUBLIC

FRANKLIN CIRCUIT COURT
CIVIL BRANCH
III DIVISION

PATRICIA A. MERTENS PLAINTIFF

V. AMENDED COMPLAINT NO. 89-CI-0098

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually, and in his official capacity; HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, and in his official capacity; THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity; FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity DEFENDANTS

* * * * * * * * * * *

Comes the Plaintiff, Patricia A. Mertens, with leave of Court, for her Amended Complaint herein, and states:

1. That Plaintiff reaffirms and reiterates each and every allegation contained in the original Complaint filed herein;

2. That 42 U.S.C. §1983 provides, in pertinent part:

> **Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ....

3. That the termination of Plaintiff in her employment as Director of Child Support Enforcement was pursuant to the custom of the Commonwealth of Kentucky, constitutionally impermissible under the 1st and 14th Amendments to the U.S. Constitution, whereby unclassified state employees who were not politically allied with the newly elected Governor or his political supporters during the primary or general election are discharged by the newly elected Governor for the purpose of replacing such unclassified state

employees with persons who were politically allied with the newly elected Governor or his political supporters during the primary or general election, all without regard to whether political affiliation with the newly elected Governor is an important requirement for the effective performance of the employment from which such unclassified state employee is discharged.

I. Plaintiff's political affiliation with a faction of the Democratic Party not aligned with the Wilkinson faction:

4. That by letter dated March 11, 1987, the immediate predecessor to Defendant, Wallace G. Wilkinson ("Wilkinson"), Governor Martha Layne Collins, gave prior written approval to the appointment of Plaintiff to the post of Director of the Division of Child Support Enforcement in the Department for Social Insurance of the Cabinet for Human Resources of the Commonwealth of Kentucky, effective April 1, 1987; (see, Exhibit A, hereto);

5. That thereby Plaintiff was demonstrably affiliated with the faction of the Kentucky Democratic party of which Governor Collins was then the head;

6. That insofar as elections for Governor of Kentucky are concerned, the Commonwealth of Kentucky has a de facto one-party system, albeit factionalized; that since the end of World War II in 1945, every Governor, with but one exception, has been the person who won the Democratic primary for Governor;

7. That under Ky. Const. §71, Governor Collins was ineligible for election as Governor to the succeeding four years after the expiration of the term for which she had been elected; that there were at least four (4) major candidates for the nomination of the Democratic party in the May 1987 Democratic primary which included Wilkinson, former Governor John Y. Brown, former Gov. Julian M. Carroll, and then Lt. Governor Steven L. Beshear;

8. That a major and much publicized act of Governor Collins during her administration was that of convincing the Japanese automobile manufacturing company, Toyota, to locate a major automobile assembly plant in Scott County, Kentucky; that because a significant portion of the cost of the location of the Toyota plant in Scott County, Kentucky was to be borne by Kentucky taxpayers, that act was politically controversial;

9. That as a part of his candidacy for the nomination of the Democratic party for Governor, Wilkinson campaigned on that issue, suggesting that too much of the cost of locating the Toyota plant in Scott County, Kentucky was to be borne by Kentucky taxpayers, thereby criticizing Governor Collins politically, although Governor Collins was a member of the Democratic party as was, and is, Wilkinson;

10. That former Governor Collins did not publicly support the candidacy of Wilkinson for the nomination of the Democratic party for Governor of Kentucky;

II. The proper performance by Plaintiff of her state employment antagonized a powerful political ally of Wilkinson:

11. That the Division of Child Support Enforcement is tightly regulated by Federal law and regulations; that the only flexibility that participating states have under the Federal program is that of establishing a state plan of child support enforcement which must be approved by a Federal regulatory body; that failure on the part of any state to operate the child support enforcement program according to the approved state plan and applicable Federal law and regulations can result in either the imposition of fiscal sanctions against the program by the Federal regulatory body, or a disallowance of Federal participation in program expenditures;

12. That during the 1987 election campaign for Governor, the Fayette County Attorney was a political supporter of Wilkinson; that on September 10, 1987, the Lexington Herald-Leader reported that the Fayette County Attorney had endorsed Wilkinson's candidacy for Governor;

13. That the office of the Fayette County Attorney had contracted with the Division of Child Support Enforcement to provide judicial activities for child support enforcement, in return for which the Fayette County Attorney's office was to be reimbursed a percentage of its administrative costs, and was to be paid, as an incentive, a percentage of the amount of child support collected and reported to the Division;

14. That from April 1987 until her termination as Director of Child Support Enforcement, Plaintiff experienced considerable difficulty in convincing the Fayette County Attorney to adhere to federal policy, and procedures for child support enforcement established by the Division of Child Support Enforcement for the Commonwealth of Kentucky;

15. That the problems referred to above included an audit of reported collections for which the Office of the Fayette County Attorney received back as incentive payments a percentage of collections reported;

16. That as Director of Child Support Enforcement for the Commonwealth of Kentucky, Plaintiff was charged with securing compliance of participating county attorneys of the Commonwealth and other contracting officials, so as not to jeopardize Federal participation in the program; that, in the performance of that duty, significant animosity between Plaintiff and the Fayette County Attorney's office arose, and was ongoing in increasing intensity until Plaintiff's discharge;

17. That Plaintiff is informed, does believe, and therefore alleges that the Fayette County Attorney had at all times pertinent, significant influence on political patronage for the Wilkinson administration with respect to state employment of Fayette County residents seeking state employment;

18. That either, pursuant to an exercise of political influence of the Fayette County Attorney with Wilkinson, or by way of a reward by Wilkinson to the Fayette County Attorney for the political support of

Wilkinson by the Fayette County Attorney, as aforesaid, or other political, but constitutionally impermissible reason, Plaintiff was replaced as Director of Child Support Enforcement by George Ewen, Chief Administrator of the Fayette County Attorney's office, shortly after January 29, 1988, the last date of Plaintiff's employment; that George Ewen was at all times pertinent a political ally of the Fayette County Attorney, as evidenced by the political flyer of George Ewen in connection with George Ewen's candidacy for Fayette County Sheriff, a true copy of which is attached, marked Exhibit B for identification and incorporated herein by reference;

19. That contemporaneous with Plaintiff's termination effective January 29, 1988, by letter dated January 22, 1988 (see, Exhibit C, hereto) Plaintiff was complimented by her immediate superior for Plaintiff's job performance as Director of Child Support Enforcement;

20. That the discharge of Plaintiff, as a "Collins" person, from her employment as Director of Child Support Enforcement for the Cabinet of Human Resources was for the purpose of creating a vacancy in an unclassified position in state government in order that such vacancy could be filled by Defendants, Wilkinson and Cowherd, by a political supporter of Wilkinson, or a political ally of a political supporter of Wilkinson;

21. That in July 1987, Plaintiff was warned by David Cathers, former Director of Child Support Enforcement for the Commonwealth of Kentucky that, by strictly enforcing Division procedures against

county attorneys and other contracting officials with political ties to then Democratic nominee for Governor, Wilkinson, Plaintiff was placing her continued employment as Director of Child Support Enforcement for the Commonwealth of Kentucky in jeopardy;

22. That in 1988 Plaintiff was informed by a person whose father had been Wilkinson's county campaign chairman for a far western Kentucky county, that such person had been told in the fall of 1987, that Plaintiff was to be replaced as Director of Child Support Enforcement for the Commonwealth of Kentucky;

23. That following the primary election of 1987 wherein Wilkinson was chosen Democratic nominee for Governor of Kentucky, Plaintiff frequently discussed with Plaintiff's immediate supervisor, whether action being taken to obtain Fayette County's compliance with federal regulations and procedures would jeopardize Plaintiff's position as Director of Child Support Enforcement; Plaintiff was told that her duty was to operate the Division so as to be answerable to the Kentucky General Assembly;

24. That Wilkinson and Cowherd acted pursuant to the custom mentioned in Numerical Paragraph 3, constitutionally impermissible under the 1st and 14th Amendments to the U.S. Constitution, when discharging Plaintiff, with the unconstitutional motive and intent on their parts, as set out above, to discharge Plaintiff, either because of Plaintiff's political affiliation with a faction of the Democratic party which was not aligned with Wilkinson, or because of political antagonism between Plaintiff and a political supporter

and ally of Wilkinson, or to create a vacancy in an unclassified position in state government by discharging Plaintiff, an unclassified employee not politically aligned with Wilkinson or Wilkinson's political supporters, in order to fill such vacancy with a person who was politically aligned with Wilkinson or Wilkinson's political supporters, or for all such reasons;

WHEREFORE, Plaintiff demands judgment as in her original Complaint.

/s/ W. C. Jacobs

WILLIAM C. JACOBS
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2464
ATTORNEY FOR PLAINTIFF

I, Patricia A. Mertens, Plaintiff herein state under oath that I have read the foregoing Amended Complaint, and the allegations contained therein are true, as I verily believe.

/s/ Patricia A. Mertens

PATRICIA A. MERTENS

STATE OF KENTUCKY)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by Patricia A. Mertens on this the 7th day of April, 1989.

My Commission expires: June 13, 1989.

/s/ Rheba C. McClellan
NOTARY PUBLIC

CERTIFICATE OF SERVICE

This is to certify that the foregoing Amended Complaint was served on Defendants by mailing a true copy of same to their attorney of record, Hon. Trisha Z. James, Cabinet for Human Resources, Office of the Counsel, 275 East Main Street - 4 West, Frankfort, Kentucky 40621, on this the 7th day of April, 1989.

/s/ W. C. Jacobs
ATTORNEY FOR PLAINTIFF

Supreme Court, U.S.
FEB 8 1994
OFFICE OF THE CLERK

No. 93-1071

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

PATRICIA A. MERTENS - - - - Petitioner

versus

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, individually and in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity - - - - - - - - Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Kentucky's narrowly tailored patronage practice impermissibly discriminate against the Petitioner where (1) such practice furthers a vital government interest by the selection or retention for a significant, unclassified high-level policy-making and supervisory position in the state government system of only such person who will loyally and effectively further the goals and implement the policies for which an administration was duly elected; (2) the Petitioner fails to demonstrate by facts alleged in any pleading (a) what activity or conduct she undertook which constitutes speech protected by the First Amendment, (b) that this activity or conduct was a substantial factor in the decision not to retain her in such policy-making position, (c) that the motive or intent of any Respondent in not retaining her in such position was to deprive her of the right to such speech, and (d) that by statute, regulation or the terms of her appointment by a previous administration she had any entitlement or interest to the policy-making position protected by the Fourteenth Amendment to continued employment or reemployment in such position in a new administration; and (3) such defective pleading does not give fair notice to Respondents of the precise nature of the claims against them?

2. Does this Court's qualified immunity jurisprudence require a heightened pleading in 42 U.S.C. § 1983 cases involving individual government officials?

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No. 93-1071

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

PATRICIA A. MERTENS - - - - - - - *Petitioner*

v.

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, individually and in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY, (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity - - - - - *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Kentucky rendered September 30, 1993, in Case No. 90-SC-778-DG. The Memorandum Opinion of the Court in that case is not to be published.

COUNTERSTATEMENT OF THE CASE

Respondents agree in substance with Petitioner's procedural history of the case.

On April 1, 1987, Petitioner was appointed, pursuant to Kentucky Revised Statutes (hereinafter "KRS") 12.050, as the Division Director of Child Support Enforcement in the Department for Social Insurance of the Kentucky Cabinet for Human Resources, an agency of the executive branch of government of the Commonwealth of Kentucky created by KRS Chapter 194 to develop and administer health, welfare and human services programs for the citizens of Kentucky. There was no employment contract involved in her appointment as Division Director.

By statute [KRS 18A.115(i)] the position of Division Director is unclassified, unless certified for classification pursuant to KRS 18A.170. Petitioner admitted in her complaint that she was an unclassified employee. She confirms such admission in the Petition for Writ of Certiorari.

In accordance with an implementing regulation, 101 Kentucky Administrative Regulation 3:050(3), an employee in an unclassified position such as Division Director is subject to dismissal upon written notice by the appointing authority ". . . for cause, or without cause." Petitioner admitted in her complaint that her dismissal from the position of Division Director on January 22, 1988, was "without cause."

On January 20, 1989, Petitioner filed this action pursuant to 42 USC § 1983 in the Franklin Circuit Court, alleging violation of her constitutional rights under the First and Fourteenth Amendments. Specifically, she alleged in her original complaint that "a substantial or motivating factor . . . or the sole reason for the discharge of plaintiff by defendant . . . was her political beliefs."

The Franklin Circuit Court dismissed the original complaint with leave to amend "to state non-conclusory allega-

tions of evidence of constitutional motive or intent." In her amended complaint Petitioner alleged "unconstitutional motive and intent." However, the Franklin Circuit Court dismissed the amended Complaint for failure "to state a claim in terms of facts rather than conclusions . . . ." Petitioner's motion to reconsider such dismissal was denied. Petitioner appealed.

The Kentucky Court of Appeals decision on that appeal was in three parts. First, the appellate court upheld the circuit court's dismissal of Petitioner's action for damages against the individual defendants in their official capacity, while holding that an action for injunctive relief against defendants was proper under § 1983.

The Court of Appeals then analyzed the statutory scheme and held that Petitioner's only option in appealing a dismissal without cause was an action in Franklin Circuit Court; Respondents' argument that Petitioner failed to exhaust administrative remedies was held to be without merit. The state court action was not, however, merely an appeal of the dismissal, but was also a separate action under 42 USC § 1983.

In the third part of its decision the Court of Appeals held that "[t]he requirements for asserting constitutional deprivations in § 1983 claims are the same for [sic] those establishing the underlying constitutional violations." Although the Petitioner asserted deprivation of freedom of speech, the Court of Appeals held she failed to assert "any conduct, speech, or belief that was constitutionally protected, nor [did she show] that the Respondents decided to dismiss her because of any such conduct." On this basis the Court of Appeals upheld dismissal of the amended complaint for failure to state a claim.

The Supreme Court of Kentucky granted discretionary review, and on January 16, 1992 affirmed the Court of Appeals. In pertinent part the Supreme Court held:

It is clear that the First Amendment forbids discharge of public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. *Rutan* v. *Illinois*, ___U.S.___, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), *Branti* v. *Finkel, supra; Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, the U.S. Supreme Court stated in *Rutan* that a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high level employees on the basis of their political views. S.Ct. at 2737, L.Ed.2d at 66, citing *Elrod* v. *Burns, supra*.

We believe it is clear that Metens' position, Division Director of Child Support Enforcement, is a significant, high-level position in the state government system. Only the Commissioner for Social Insurance and the Secretary of the Cabinet for Human Resources are closer to the Governor in the ranking system. It also involves supervisory duties of more than two hundred employees. The civil service laws embodied in Kentucky's statutory system clearly define the position as "policy-making." Division directors who are considered policy makers are not certified. If a division director disagrees, a hearing is held. The Division Director of Child Support Enforcement is not a certified position. Clearly, it is in choosing or dismissing individuals at this high-level of service that enables an administration to further the goals and implement the policies for which it was elected.

There is not merit in Mertens' contention that *Branti* v. *Finkel, supra*, compels a different result. The plaintiffs in Branti held only entry level positions. None of the political patronage cases cited by Mertens dealt with high level office involved here.

As to a heightened pleading requirement for § 1983 actions, the Kentucky Supreme Court held:

> Pleading in federal courts, as in this Commonwealth, is notice pleading. It is only in actions brought pursuant to § 1983, where motive is the issue, that heightened pleading standards are mandated. The mere fact that state court claims do not require pleading with specificity is totally irrelevant to the issue of a § 1983 pleading.

On March 8, 1993, a petition for writ of certiorari was granted, the foregoing judgment of the Kentucky Supreme Court was vacated and the case was remanded for further consideration in light of *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Memorandum Decision, ___U.S.___, 113 S.Ct. 1407, 122 L.Ed.2d 779 (1993).

On remand, in an unpublished Memorandum Opinion rendered on September 30, 1993, the Supreme Court of Kentucky again affirmed the dismissal of Petitioner's complaint. After observing in dicta that "it would appear" the holding in *Leatherman, supra,* that there is no heightened pleading standard in § 1983 municipal liability actions, "applies to all § 1983 cases," the Kentucky Supreme Court held that the trial court and the Kentucky Court of Appeals were correct in dismissing Petitioner's complaint because "[s]ufficient reason does exist under the application of appropriate and longstanding Kentucky principles of civil procedure for notice pleading to sustain the dismissal."

Citing *Rutan* v. *Illinois,* 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d. 52 (1990); *Branti* v. *Funkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod* v. *Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); and *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), as well as other federal and state cases and applicable state statutes and regulations, the Kentucky Supreme Court concluded that the position from which Petitioner was

dismissed was "a significant, high-level" unclassified position, and that the selection or dismissal of persons at that level was proper because it "enables an administration to further the goals and implement the policies for which it was elected", and because there were no allegations in Petitioner's complaint sufficient under even "the most liberal construction of notice pleading" to demonstrate what activity or conduct was undertaken by Petitioner which constituted speech protected by the First Amendment. The Court further held that the pleadings were not adequate to give Respondents fair notice as to whether such activity or conduct was a substantial factor in the decision not to retain Petitioner as a Division Director, and whether the motive or intent of any Respondent in removing Petitioner from that position was to deprive her of such protected speech. The Court also held that Petitioner had failed to demonstrate in her pleading that she had any entitlement to or property or liberty interest under State law or the terms of her appointment in the Division Director position that was protected by the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

I. The Decision of the Kentucky Supreme Court is Correct Without Regard to the Questions Sought to be Raised by the Petition for Writ of Certiorari.

In denying Petitioner's claims, the Kentucky Supreme Court properly applied the principles of *Rutan, supra; Branti, supra; Elrod* v. *Burns, supra;* and *Mt. Healthy, supra,* in holding that Kentucky has a vital interest in being able to choose or dismiss high-level policy-making officials in Petitioner's position as a Division Director on the basis of their political views, and that the state's narrowly tailored patronage practice which is set out in the state statutes and regulations did not impermissibly discriminate against the Petitioner when she was removed

from such a position by a new administration which had been duly elected.

The Kentucky Supreme Court also properly applied recognized state and federal notice pleading principles in ruling that Petitioner failed to give Respondents fair notice of the precise nature of the claims against them, and failed to state a claim upon which any relief could be granted under 42 U.S.C. § 1983.

Since the Kentucky Supreme Court fully considered and correctly decided these issues based on an unbroken line of authority established by this Court, there is no real conflict on the same matter of law and fact between the decision of the Kentucky Supreme Court and any decision rendered by this Court or some lower court whose judgment may be final in the absence of United States Supreme Court review. Therefore, there is clearly no basis or need for their review on a writ of certiorari. Accordingly, the writ should be denied.

II. The Decision of the Kentucky Supreme Court Affects No One Other Than the Parties to That Action.

By operation of Rule 76.28(4) of the Kentucky Rules of Civil Procedure, the unpublished Memorandum Opinion rendered on September 30, 1993, which the Kentucky Supreme Court designated "Not To Be Published," cannot be cited or used as authority in any other case in any court in the Commonwealth of Kentucky. The Kentucky Rules of Civil Procedure were prescribed by the Kentucky Supreme Court under the rule-making power granted by Section 116 of the Kentucky Constitution. Except for special statutory proceedings, not applicable here, these rules govern procedure and practice in all actions of a civil nature in all state courts in Kentucky. Rule 1(2), Ky.R.Civ.P.

Rule 76.28(4) provides in pertinent part:

CR 76.28 Opinions

. . . .

(4) Publication.

(a) . . . . Every opinion shall show on its face whether it is "To Be Published" or "Not To Be Published."

. . . .

(c) Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state."

The constitutionally of the foregoing prohibition against the citation as authority of an unpublished opinion in another case was recently addressed in *Goodlet* v. *Commonwealth of Kentucky*, 825 S.W.2d 290 (Ky.App. 1992). In that case the Kentucky Court of Appeals held that the practice of appellate courts in rendering unpublished opinion, combined with the bar to citation to such opinions, set out in Rule 76.28(4), did not deprive the defendant therein of either due process or equal protection under the U.S. or State Constitutions. In an earlier opinion, the Kentucky Court of Appeals had held that even though an unpublished opinion cannot be cited as authority in another case, it is the law of the case where it is rendered and may be cited in that case for that purpose. *Penco* v. *Detrex Chemical Industries*, 672 S.W. 2d 948 (Ky.App. 1984).

Since the Memorandum Opinion which is the subject of the instant petition for writ of certiorari cannot be cited or otherwise used as authority in any other case, the questions sought to be raised by the petition for writ of certiorari are of importance only to the parties to that action and not of sufficient general importance for review by this Court. Therefore, the petition should be denied.

III. There is no Conflict Between Decisions of the United States Courts of Appeals on the Matter of a Heightened Pleading Standard as set out in the Questions Sought to be Raised by the Petition for Writ of Certiorari.

In what is clearly dicta, the Supreme Court of Kentucky stated in its unpublished Memorandum Opinion rendered on September 30, 1993, that it interpreted the holding in *Leatherman, supra,* that there is no heightened pleading standard in § 1983 municipal liability actions, as being applicable "to all § 1983 cases. . . . Petitioner would have this Court review that observation.

However, upon review of the United States Courts of Appeals decisions cited and discussed by the Petitioner, including *District Council 47* v. *Bradley,* 795 F.2d 310 (3d Cir. 1986), and *Hobson* v. *Wilson,* 737 F.2d 1 (D.C.Cir. 1984), *cert. denied,* 105 S.Ct. 1843 (1985), as well as others that have addressed the issue of a heightened pleading standard in non-municipal liability cases, it is clear there is no real conflict between those decisions. All require that a civil rights plaintiff meet a stricter or heightened standard of pleading when qualified immunity is implicated in the complaint. Furthermore, this Court in *Leatherman, supra,* 113 S.Ct. at 1162, unanimously indicated it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials."

The most recent of these courts of appeals decisions is *Kimberlin* v. *Quinlan,* 6 F.2d 789, 793-5 (D.C.Cir. 1993) (*Bivens* action, where with one concurring judge, 6 F.2d at 798-9, the Court cites *Hobson* v. *Wilson, supra,* and holds that a "heightened pleading" standard applies where subjective intent is an element of the underlying constitutional claim). Other decisions include *Correa-Martinez* v. *Arrillaga-Belendez,* 903 F.2d 49, 52-3 (1st Cir. 1990) (the dismissal of a civil rights forced resignation complaint for

failure to state claim was affirmed where the alleged facts did not outline facts sufficient to specifically identify discriminatory animus); *Polur* v. *Raffe,* 912 F. 2d 52, 56 (2nd Cir. 1990) (plaintiff must state more than conclusionary allegations to avoid dismissal of civil rights claim arising out of alleged conspiracy); *Rose* v. *Bartle,* 871 F.2d 331, 353-4 (3rd Cir. 1989) (citing *Bradley, supra,* a Title VII case which applied a stricter pleading standard, but found it satisfied, the Court reaffirmed that civil rights complaints must plead facts with greater specificity than mere notice pleading to survive dismissal); *Dunbar Corp.* v. *Lindsey,* 905 F.2d 754, 763-4 (4th Cir. 1990) (finding a "heightened pleading" standard appropriate in civil rights actions against government officials); *Jackson* v. *City of Beaumont Police Dep't.,* 958 F.2d 616, 620 (5th Cir. 1992) (§ 1983 plaintiffs must meet a "heightened pleading" requirement where an immunity defense can be raised); *Nuclear Transport & Storage, Inc.* v. *U.S.,* 890 F.2d 1348, 1354-5 (6th Cir. 1989), *cert. denied,* 110 S.Ct. 1807 (1989), (complaint attempting to state a *Bivens* claim against individual defendants is subject to the same "heightened pleading requirements applied under 42 U.S.C. § 1983, as in the case of *Chapman* v. *City of Detroit,* 808 F.2d 459 (6th Cir. 1986), which held, 808 F.2d at 465, that a civil rights complaint against governmental officials for money damages must contain more than conclusionary allegations); *Elliott* v. *Thomas,* 937 F.2d 338, 344-5 (7th Cir. 1991) (citing and quoting from *Siegert* v. *Gilley,* ___U.S.___, 111 S.Ct. 1789, 1795, 114 L.Ed.2d 277 (1991), Kennedy, J., concurring, the Court opined that a defendant prevails on immunity grounds if the plaintiff does not plead "'specific, nonconclusionary factual allegations which establish [the necessary mental state] . . . .'" *See also Cohen* v. *Illinois Institute of Technology,* 581 F.2d 658, 663 (7th Cir. 1978); *Arnold* v. *Jones,* 891 F.2d 1370, 1373 n.3 (8th Cir. 1989) (damages actions against government officials are subject to a "heightened pleading"

standard); *Branch* v. *Tunnell*, 937 F.2d 1382, 1386-7 (9th Cir. 1991), affirmed in pertinent part in later proceeding, 1994 U.S.App.LEXIS 409 (January 12, 1994) (a district court must apply a "heightened pleading" standard in Bivens or § 1983 cases where a defendant's subject intent is an element of the alleged constitutional violation); *Dunn* v. *White*, 880 F.2d 1188, 1198 (10th Cir. 1989) (plaintiff must plead specific, not conclusionary allegations in § 1983 action seeking damages); and *Oladeinde* v. *City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) (applying a "heightened specifically" requirement of Rule 8, F.R.Civ.P., in a § 1983 case where the qualified immunity defense raised under Rule 12(b)(6), F.R.Civ.P., motion to dismiss).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

[EXCERPTS FROM KENTUCKY REVISED STATUTES]

12.050. Deputy heads of departments and directors of divisions and institutions.—Unless otherwise provided by law, deputy heads of departments, and directors of divisions and institutions shall be appointed by the heads of the departments and in statutory departments the appointment of deputy heads of departments, and heads of divisions shall be with the prior written approval of the Governor. In departments each division head shall report to the head of the department to which the division is assigned. (4618-154, 4618-155: amend. Acts 1948, ch. 228; 1950, ch. 123, § 29; 1974, ch. 74, Art. I, § 13; 1982, ch. 393, § 6, effective July 15, 1982.)

* * * * *

18A.005. Definitions for KRS 18A.010 to 18A.200.—

As used in this chapter, unless the context indicates otherwise:

(1) "Appointing authority" means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employ appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification or other position actions. Such designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the commissioner;

* * * * *

(3) "Board" means the personnel board created by KRS 18A.045;

* * * * *

(7) "Classified service" includes all the employment subject to the terms of this chapter except for those positions

expressly cited in KRS 18A.115; a "classified position" is a position in the classified service;

• • • • •

(17) "Penalization" shall include, but not be limited to, demotion, dismissal, suspension, fines and other disciplinary actions, involuntary transfers; salary adjustments; any action that diminishes the level, rank, discretion or responsibility of an employee without proper cause, including a reclassification or reallocation; and the abridgement or denial of other rights granted to state employes;

(18) "Position" means an office or employment in an agency (whether part-time, full-time, permanent, temporary, seasonal, federally funded time-limited, or emergency, occupied or vacant) involving duties requiring the services of one (1) person;

• • • • •

(31) "Status" means the acquisition of tenure with all rights and privileges granted by the provisions of this chapter after satisfactory completion of the initial probationary period by an employe in the classified service;

• • • • •

(Repealed, reenact, and amend. 1982, ch. 448, § 1, effective July 15, 1982; 1986, ch. 494, § 7, effective July 15, 1986; 1988, ch. 129, § 1, effective July 15, 1988; 1988, ch. 203, § 1, effective July 15, 1988.)

• • • • •

18A.115. Employment exempted from classified service—Reversion rights of career employees promoted outside classified service.—

(1) The classified service to which KRS 18A.005 to 18A.200 shall apply shall compromise all positions in the state service now existing or hereafter established, except the following:

• • • • •

(i) Division directors subject to the provisions of KRS 18A.170. Division directors in the classified service as of

January 1, 1980, shall remain in the classified service;

* * * * *

(2) Nothing in KRS 18A.005 to 18A.200 is intended, or shall be construed, to alter or amend the provisions of KRS 150.022 and 150.061.

(3) Nothing herein is intended or shall be construed to affect any non-management, nonpolicy-making position which must be included in the Classified service as a prerequisite to the grant of federal funds to a state agency.

* * * * *

(5) Nothing herein shall be constructed as precluding appointing officer from filling unclassified positions in the manner in which positions in the classified service are filled except as otherwise provided herein. (Enact. Acts 1982, ch.52, § 1, effective July 15, 1982; 1982, ch. 393, § 12, effective July 15, 1982; repealed, reenacted and amended by 1982, ch. 448, §23, effective July 15, 1982; 1984, ch. 253, effective July 13, 1984; 1984 ch. 350, § 10, effective July 13, 1984; 1986, ch. 494, § 18, effective July 15, 1986.)

* * * * *

18A.170. Certification of division directors who do not make policy.—It is further provided that the responsible department, board, commission or agency head shall at the time as which he elects to come under the provisions of KRS 18A.005 to 18A.200, certify to the board the positions of those division directors or heads under their jurisdiction whose duties are nonpolicy making together with a sufficient statement of their duties to enable to board to determine whether or not, as a matter of fact, such duties are nonpolicy making in their nature. He shall, at any time subsequent to coming under the provisions of KRS 18A.005 to 18A.200 certify to the board additional division directors or heads whose duties are nonpolicy making. At the time of certification notice thereof shall be given to the interested division director or head in the form of a copy of the statement certifying the duties of his office. The board may conduct such hearings as it may deem necessary, and

shall conduct hearing pursuant to the administrative provisions of KRS 18A.095 in the event of a difference of opinion between the certifying officer and the interested division director or head, before entering its findings of fact and the final order of the board by initiating action in the Franklin Circuit pursuant to the provisions of KRS 418.040 et seq. (Repealed, reenact. and amend. 1982, ch. 448, § 34, effective July 15, 1982.)